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No. 90-1582

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FROTA OCEANICA BRASILEIRA, S.A.,

Petitioner,

vs.

STARKHEISER DaSILVA MATOS PIRES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a case where it has been determined that the shipowner was not at fault for a seaman's injury, whether a lump-sum jury award of four years of future maintenance and forty years of future cure, calculated to pay all of the seaman's medical expenses over his estimated life expectancy, is impermissible under *Calmar Steamship Corp. v. Taylor,* 303 U.S. 525 (1938)?

2. Whether *Miles v. Apex Marine Corp.,* __ U.S. __ 111 S.Ct. 317 (1990) resolves the conflict among the First, Second and Fifth Circuits over the availability of exemplary punitive damages in addition to attorneys' fees for "wrongful" failure to provide maintenance and cure under *Vaughn v. Atkinson,* 369 U.S. 527 (1962)?

3. Should a Brazilian shipowner's good faith belief that Brazilian law governs its maintenance and cure obligations to a Brazilian seaman on a Brazilian flag ship, and that it has performed all such obligations, preclude a finding of "willful, callous or arbitrary" behavior, the predicate for punitive awards under *Vaughn v. Atkinson,* 369 U.S. 527 (1962)?

LIST OF PARTIES

The parties to the proceedings below are as follows:

Plaintiffs Below

S.M. Pires and Virginia Pires, his wife.

Defendants Below

Frota Oceanica Brasileira S.A., Eduardo Lopez as Executor for the Estate of Fernando Frota, Omnium Transportation Co. (Liberian Corp.), Omnium Agencies Inc., J. Dixon Byrne as Executor for the Estate of James Byrne, Galveston Wharves d/b/a Port of Galveston, Board of Trustees of Galveston Wharves and City of Galveston d/b/a Port of Galveston.

Parties to this Proceeding

Only Frota Oceanica Brasileira S.A. and S.M. Pires are parties to this proceeding. The following statement is provided in accordance with Rule 29.1 of the Rules of the Supreme Court of the United States.

Petitioner Frota Oceanica Brasileira S.A.'s corporate parents and the subsidiaries which it directly or indirectly owns by less than one hundred percent are listed in Appendix O. (A-50).

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OPINIONS BELOW

Frota Oceanica Brasileira, S.A. seeks certiorari to review the Memorandum Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Department, officially reported at 161 A.D.2d 129, 554 N.Y.S.2d 855 (lst Dept. 1990) (A-1). The opinion and order

of the Appellate Division are reprinted as Appendices A and I, respectively. (A-1) (A-24).

The decision and judgment of the lower court are not officially reported and are reprinted at Appendices B and J, respectively. (A-6) (A-31).

JURISDICTION

The Order of the New York State Supreme Court, Appellate Division, First Department, was entered on May 1, 1990 affirming and modifying the judgment below. Petitioner Frota Oceania Brasileira, S.A. sought leave to appeal to the New York State Court of Appeals and was denied by both the Appellate Division and subsequently, by the Court of Appeals. Petitioner timely moved the Court of Appeals to reconsider its denial. The Court of Appeals denied the relief on January 15, 1991. This Petition for a Writ of Certiorari was filed within 90 days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) (1961).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Article III, Section 2, Clause 1, provides that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public ministers and Consuls; — to all cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State, —

> between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, the Citizens thereof, and foreign States, Citizens or Subjects.

The Judicial Code, 28 U.S.C. §1333 (1949) (corresponds to The Judiciary Act of 1789, Section 9, Stat. 76-77), provides that:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
>
> (2) Any prize brought into the United States and in all proceedings for the condemnation of property taken as prize.

The Jones Act, 46 U.S.C. §688 (1975) provides that:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

STATEMENT OF THE CASE

In this admiralty and maritime case, Petitioner, Frota Oceanica Brasileira, S.A. seeks plenary review of a decision of the New York State Supreme Court, Appellate Division, First Department, affirming a judgment of the New York State Supreme Court that (1) awarded respondent S.M. Pires over $1,323,666.70 in maintenance and cure, most of which is a lump-sum award of forty years worth of "future" cure and (2) held Frota liable for consequential damages, attorneys' fees and punitive damages, which alone are presently quantified at $24,000,000.00, for "willful" termination of maintenance and cure.

I. The Facts

Respondent Starkheiser Pires ("Pires"), a Brazilian seaman, claims from his Brazilian employer, Petitioner Frota Oceanica Brasileira, S.A. ("Frota"), benefits under United States maritime law in the form of "maintenance and cure" payments. (R. 1992) Frota employed Pires as a merchant seaman aboard the M/V Frotaleste, a Brazilian flag merchant ship.

On December 11, 1975, a railroad freight car operated by Galveston Wharves backed over Pires while he was crossing rail tracks which intersected a public street running through a train yard in Galveston, Texas, the port in which Frota's vessel was docked. (R. 35). An ambulance crew rushed Pires to the nearest emergency room, located at John Sealy Hospital ("John Sealy") in Galveston, Texas. There the head of orthopedic surgery (R. 1127) operated on Pires, amputating his right leg. (R. 1879).

Frota paid for Pires' hospitalization and care at John Sealy until, in the opinion of the attending physician, he was almost fit for repatriation to Brazil (R. 1174; 1175; 1179;

1180), where his family resided. Pires was treated in Galveston for about two and one-half months, in which time his wounds were treated and healing, and he was fitted for both a temporary and a permanent prosthesis suitable for use in Brazil, all under the care of the head of orthopedic surgery at the hospital. (R. 1806-29).

Before he was ready to be discharged from the hospital and repatriated to his home in Brazil, without consulting or advising Frota, Pires, in the company of his recently retained and current New York lawyer, checked himself out of the hospital in Galveston and traveled to New York, where, one month later, he sought admission to the New York University Medical Center Howard A. Rusk Institute of Rehabilitative Medicine ("Rusk"). (R. 1828; 1766-7; 1180).

Although Pires and his wife always were and remain Brazilian citizens, they have never sought to return to Brazil. (R. 556).

II. The Proceedings Below

In November 1976, Pires commenced the subject action against Frota and other named defendants in New York State Supreme Court alleging a personal injury claim under 46 U.S.C. § 688 (the "Jones Act") and the general maritime law of unseaworthiness. As against Frota, these claims were eventually dismissed by the New York Appellate Division on summary judgment grounds in 1990. (A-27).

In the interim, on September 22, 1986, the plaintiff filed a notice of trial for an unpleaded cause of action for maintenance and cure. (A-23). Frota and the other defendants moved to strike the notice of trial. The court denied that motion and proceeded to trial.

In June 1987, the court conducted a jury trial on the issue of Frota's liability for maintenance and cure. In July 1987, the jury returned a verdict of $1,323.666.70 for the plaintiff, comprised of the following:

(1)	unpaid past maintenance	$200,000.00
(2)	unpaid past cure	$ 6,000.00
(3)	future maintenance	$160,000.00
(4)	future cure	$957.666.70

Also included in the jury's verdict was a special finding that Frota had been "willful, callous or arbitrary" in its termination of maintenance and cure. The court declined to instruct the jury that Frota's good faith belief that all obligations had been met precluded such a finding.

Frota moved to set aside the jury's verdict in all respects. The court denied Frota's motion in a memorandum order of July 27, 1988. (A-6). The court ruled that Brazilian law and United States law on the doctrine of maintenance and cure were the same. (A-9). The court held that United States law requires a shipowner to provide maintenance and cure to a seaman, even if chronically ill or permanently disabled without the shipowner's fault, so long as treatment is in any sense beneficial. (A-14). The court ruled that *Calmar Steamship Corp. v. Taylor*, 303 U.S. 525 (1938) and *Farrell v. United States of America*, 336 U.S. 511 (1949) permit lump-sum awards of future cure for life, no matter how long the period, so long as there is evidence upon which the need and cost can be projected. (A-16). Lastly, the court ruled that the jury's affirmative response to the court framed interrogatory describing Frota's conduct as "willful, callous or arbitrary" entitled Pires "to recover legal expenses and punitive damages" under *Vaughn v. Atkinson*, 369 U.S. 527 (1962) and consequential damages under *Cortes v. Baltimore Insular Lines*, 297 U.S. 367 (1932). (A-19).

On October 20, 1988, the court entered a judgment against Frota on the basic maintenance and cure claims, stating that the court was reserving several other issues relating to Jones Act and negligence liability, and also consequential damages from the so called failure to pay maintenance and cure. (A-31).

Frota appealed from the maintenance and cure judgment on November 18, 1988.

Thereafter, in January 1989, the parties proceeded to trial on the issue of consequential damages which arose from the alleged failure to pay maintenance and cure. This trial resulted in a jury verdict in plaintiff's favor awarding, *inter alia,* $24,000,000.00 in punitive damages. On February 21, 1989, Frota moved to set aside the punitive damage portion of the jury's verdict on the ground that such damages are not recoverable under *Vaughn*. Frota's post trial motion has gone undecided for almost two years at this point. As a consequence, there is no judgment entered as to the quantum of consequential damages, exemplary punitive damages and attorneys' fees in this case, though all of those claims have been fully tried.

On May 1, 1990 the Appellate Division, First Department issued an order and a memorandum decision summarily dismissing Pires' Jones Act claim against Frota and modifying and affirming the judgment in favor of Pires on his claim for maintenance and cure. (A-1). The Appellate Division ruled that the lifetime award of future cure was "for a definite period, albeit lengthy" within the meaning of *Calmar*. They declined to reverse the jury verdict that Frota "willfully" withheld maintenance and cure, without addressing the lower court's instructions on this issue.

On May 8, 1990 Frota moved in the Appellate Division, First Department for leave to appeal to the Court of

Appeals from (1) the maintenance and cure judgment and (2) the denial of the motion to strike the notice of trial. On July 26, 1990 the Appellate Division denied Frota's motion for leave to appeal to the Court of Appeals. (A-26).

By motion for leave to appeal filed with the Court of Appeals on August 2, 1990, Frota timely sought leave to appeal to the Court of Appeals from the maintenance and cure judgment and the order of the Appellate Division affirming that judgment.

By Order of November 27, 1990, the Court of Appeals denied Frota's motion for leave to appeal "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution." (A-25).

By Order to Show cause dated December 8, 1990, Frota moved the Court of Appeals to reconsider its decision. By Order dated January 15, 1991, the Court of Appeals denied Frota's motion without opinion. (A-24).

In February 1991, upon the expiration of all applicable stays, (A-49) Frota paid the October 21, 1988 maintenance and cure judgment, including the award of future cure, reserving the right to seek review by this Court of all aspects of the judgment.

REASONS FOR GRANTING THE WRIT

I. Maintenance and Cure: Lump-sum Awards of Future Cure For Life Are Improper

In this case, the Supreme Court of the State of New York has taken "maintenance and cure," a no fault maritime doctrine traditionally concerned with the immediate sustenance and medical needs of injured seamen, and used it to award a foreign seaman an unprecedented lump-sum in excess of

$1,000,000.00 to meet estimated medical needs and costs over an estimated life span of about forty (40) years. The decisions below are in conflict with several long-standing United States Supreme Court decisions saying that such awards are improper and impermissible.

Maintenance and cure is an ancient obligation with traceable roots to the medieval maritime codes and laws of many nations. The doctrine was adopted and refined by the Supreme Court in *Harden v. Gorden*, 2 Mason 541, Fed. Case No. 6,047 (1823); *The Osceola*, 189 U.S. 158 (1903); and *Calmar Steamship Corp. v. Taylor*, 303 U.S. 525 (1938). As presently evolved, the doctrine obligates a shipowner to provide a seaman who has been injured or fallen ill while in the service of the ship with a living allowance (maintenance) and medical care appropriate for his condition (cure).

While the obligation is an early concept of "no-fault" and is owed to the seaman regardless of whether the shipowner was negligent, it is not unlimited in scope or duration. The doctrine does not make the shipowner or the vessel an insurer of the health of the seaman, *see*, 2 Norris *The Law of Seamen*, §26:27, p. 80 (4th ed. 1986), nor does it provide compensation for the disability or the damages suffered. *Calmar*, 303 U.S. at 528; *Dixon v. Maritime Overseas Corp.*, 490 F. Supp. 1191, 1192 (S.D.N.Y. 1980) (". . . [M]aintenance and Cure is not a panacea, its objectives are limited") *aff'd*, 646 F.2d 560 *cert. denied* 454 U.S. 838.

This Court has repeatedly resisted the concept of large lump-sum awards of future cure based on vague notions of life expectancy and anticipated medical treatment and future needs. *See, Calmar*, 303 U.S. at 530-532; *Farrell*, 336 U.S. at 519; *Salem v. United States Lines Co.*, 370 U.S. 31, 38 (1962).

In *Calmar*, the Court struck a lower court's award of lump-sum future maintenance and cure stating:

> "The seaman's recovery must therefore be measured in each case by the reasonable cost of that maintenance and cure to which he is entitled at the time of trial, including, in the discretion of the court, such amounts as may be needful in the *immediate future* for the maintenance and cure of a kind and for a period which can be *definitely ascertained.*
>
> *Calmar*, 303 U.S. at 530-2 [emphasis supplied.]

In *Farrell*, this Court again refused to sanction a lifetime award of maintenance and cure to treat a seaman's needs arising as a consequence of his permanent disability stating:

> "Maintenance and cure is not the only recourse of the injured seaman. In an appropriate case he may obtain indemnity or compensation for injury due to negligence or unseaworthiness and may recover, by trial before court and jury, damages for partial or total disability. But maintenance and cure is more certain if more limited in its benefits. It does not hold a ship to permanent liability for a pension, neither does it give a lumpsum payment to offset disability based on some conception of expectancy of life."
>
> *Farrell*, 336 U.S. at 519.

While awards of future maintenance and cure are not wrongful or clearly erroneous *per se*, the cases clearly show that the *Calmar* admonition to limit such awards to sums definitely needed in the relatively near future is strictly followed. *See*, 2 Norris, *The Law of Seamen* §26:30, p. 86, n.89 (4th ed. 1986) and cases cited therein.

This Court's decisions in *The Osceola, Calmar* and *Farrell* make clear that the limitations on lump-sum awards of maintenance and cure are not simply a matter of evidence, as the New York courts have held in this case, but are grounded in the history and nature of the remedy itself.

There is no precedent for a lump-sum award of maintenance and cure addressed to plaintiff's lifetime needs over a period of about 40 years, such as that which the New York Supreme Court and the Appellate Division have fashioned in this case. The decisions below seem to be squarely in conflict with the law as defined by this Court. It is on the basis of this direct conflict between the directions of this Court and the actions of the courts below, and the fact that the Court's decision on the issues raised herein will be broadly applicable to all cases where seamen incur permanent injury or chronic illness without the shipowner's fault, that Frota respectfully submits that the Court should grant certiorari to review and pass upon the case.

II. The Punitive Damage Award Under Vaughn

The second aspect of the decisions below deserving review is the lower courts' imposition of liability for punitive damages on Frota for "wrongful" failure to provide maintenance and cure under *Vaughn v. Atkinson,* 369 U.S. 527 (1962). The liability finding for such damages is embodied in the judgment before the Court, which provides that Pires shall recover damages because Frota's breach of duty was said to be "willful." The claim has been fully tried, and the quantum of exemplary punitive damages has been fixed by a jury at $24,000,000.00.

While the trial court has yet to rule on Frota's motion to set aside the second jury's award of $24,000,000.00 as unauthorized by *Vaughn*, the trial court long ago refused to set aside the first jury's verdict that Frota's conduct had been "willful" in its order and opinion of July 27, 1988. (A-20). Frota challenged this aspect of the trial courts' decision in its appeal to the Appellate Division, and the Appellate Division explicitly affirmed on this point in its order and opinion of May 1, 1990. Frota has no further appeals as of right in the New York State court system on the issue of its liability for a

punitive award. Since the finding of "willfullness" is included in the October 20, 1988 judgment which Frota was obligated to pay, it appears that the issues raised by that finding are presented for the Court's review at this time.

i) Conflict in the Circuits Over *Vaughn*

This Court has never expressly allowed punitive damages, denominated as such, in a maritime, maintenance and cure case. The Court's most recent decision speaking to the measure of damages available in a maintenance and cure case in excess of basic maintenance and cure payments was *Vaughn v. Atkinson,* 369 U.S. 527 (1962).

In *Vaughn*, Mr. Justice Douglas, writing for the majority and relying upon *Cortes v. Baltimore Insular Lines,* 287 U.S. 367 (1932), held that in an action for maintenance and cure the seaman is entitled not only to his actual damages but also to an award of counsel fees where the defendant's default is "callous" or "willful and persistent."

The Court's decision in *Vaughn* has engendered a "great deal of controversy" among the lower courts concerning the legal standard for awarding any damages punitive in nature in a maintenance and cure case, and the type of such damages which may properly flow from a finding that the shipowner has "wrongfully" failed to meet its duty. *See*, T. Schoenbaum, *Admiralty & Maritime Law,* 1990 Supplement, §5-2 p.31. Before turning to this conflict, however, there is a threshold question as to whether this Court's recent decision in *Miles v. Apex Marine Corporation, infra,* resolves the entire controversy over the availability of punitive damages in maintenance and cure cases.

ii) *Miles v. Apex Marine Corporation* Resolves the Conflict Over *Vaughn*

This Court's recent decision in *Miles v. Apex Marine Corporation*, __ U.S. __, 111 S. Ct. 317 (1990) suggests that there should be no award of punitive damages in maintenance and cure cases. In *Miles*, the Court ruled that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman, on the ground that Congress had limited recovery in such cases to pecuniary damages in the Jones Act, 46 U.S.C. §688. The Court stated that "it would be inconsistent with our place in the Constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence." *Miles*, 111 S.Ct. at 326.

Miles is made applicable to this case by *Cortes, supra*. *Cortes* held that the Jones Act provides a remedy for a shipowner's failure to provide maintenance and cure.

Punitive damages are not recoverable under the Jones Act, *Kopcynski v. Jacqueline*, 742 F.2d 555 (9th Cir. 1984), or the Death on the High Seas Act 46 U.S.C. §761 *et seq.*; *Bergen v. F/V St. Patrick*, F.2d (9th Cir. 1987). Since punitive damages are not recoverable under the Jones Act, and the claim for consequential damages for failure to provide maintenance and cure is covered by the Jones Act, it appears that continued recognition of any claim for punitive damages in such a case under *Vaughn* would constitute a judicially created cause of action, in which liability is without fault, allowing a "more expansive remedy" than Congress has allowed in cases of injury or death resulting from the shipowner's negligence under the Jones Act. Accordingly, it appears that under *Miles* an award of punitive damages is no longer permissible in maintenance and cure cases. The conflict in the Circuits over

Vaughn is resolved. The decision below is clearly erroneous and should be reversed.

iii) The Conflict Over *Vaughn*: Liability Standards and Damages

If *Miles* has not ruled out awards of punitive damages in maintenance and cure cases, there remains an urgent need for this Court to address the issue and clarify the holding of *Vaughn*, both as to the standard of conduct which justifies imposition of punitive damages and the type of damages which may be recovered.

In the years since *Vaughn* was decided, the federal courts have ranged from holding that a shipowner's good faith in contesting liability for maintenance and cure is irrelevant to an award of attorneys' fees under *Vaughn, see, Jordan v. Norfolk Dredging Company,* 223 F. Supp. 79 (E.D.Va. 1963), to requiring that the shipowner be guilty of actual bad faith or malice before a punitive award is warranted. *See, Harper v. Zapata Off-Shore Company,* 741 F.2d 87 (5th Cir. 1984). The latter position has come to represent the majority view. *Morales v. Garijak, Inc.,* 829 F.2d 1355 (5th Cir. 1987); *Kraljic v. Berman Enterprises Inc.,* 575 F.2d 412 (2d Cir. 1978).

The majority view that bad faith is required is consistent with this Court's subsequent employment of *Vaughn* as the primary vehicle for the shifting of attorneys' fees in non-maritime cases under the so called "bad faith" exception to the "American Rule" against awarding fees to the prevailing party. *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967); *Hall v. Cole,* 412 U.S. 1 (1973); *F.D. Rich Co. Inc. v. United States for the use of Lumber Industrial Co. Inc.,* 417 U.S. 116 (1974); *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975).

This Court, however, has not spoken to *Vaughn* in the context of a maintenance and cure case to clarify the requirement of bad faith in such cases, and the decisions below reflect continuing confusion on this point.

The Circuit Courts have also split on the type of damages which are recoverable under *Vaughn* upon a showing of the requisite culpable conduct. In *Robinson v. Pocahontas*, 477 F.2d 1048 (lst Cir. 1973) the Court of Appeals for the First Circuit held that an arbitrary and capricious failure to pay maintenance and cure warranted punitive damages not limited to attorneys' fees. The Fifth Circuit has agreed with the First Circuit that exemplary punitive damages are recoverable. *Harper, supra; Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110 (5th Cir. 1984). The Second Circuit, however, has expressly rejected *Robinson* and ruled that *Vaughn* limited punitive damage awards in maintenance and cure cases to attorneys' fees. *Kraljic v. Berman Enterprises*, 575 F.2d 412 (2d Cir. 1978). Other courts have followed the Second Circuit. *See, Owens v. Conticarriers & Terminals, Inc.*, 591 F. Supp. 777 (W.D. Tenn. 1984).

iv) The Decisions Below Are In Direct Conflict With The Second Circuit and Expand Existing Conflict Over *Vaughn*

a) Expansion of Existing Conflict

The liability standard employed by the New York State Courts in the decisions below to justify imposition of punitive damages on Frota is in conflict with the majority view that bad faith or malice is a prerequisite for imposing a punitive award under *Vaughn* in a maintenance and cure case.

The trial court below refused to instruct the jury that a good faith disagreement as to the shipowner's further liability for maintenance and cure precluded a "punitive" award under

Vaughn. (R. 1725-1730; Ct. Ex. 1). The trial court instructed the jury to answer the "willful" interrogatory in the affirmative if they found that Frota acted unreasonably. (A-22). The jury was not instructed that this Brazilian shipowner's good faith belief that Brazilian law applied and that it had performed all of its obligations under Brazilian law precluded a finding of "willfulness" or "callousness." As a result, the verdict and the judgment below are in error. The decisions below are a retreat toward the discredited minority view that *Vaughn* imposes punitive damages on shipowners irrespective of their good faith.

The decisions below are also in conflict with the prevailing standards for awards of punitive damages in maritime law generally, outside of maintenance and cure cases. Under federal maritime law, a "good faith but erroneous" belief in one's non-liability does not give rise to a claim for "damages for bad faith and attorneys' fees." *Edinburgh Assurance Co. v. R.L. Burns Corp.*, 669 F.2d 1259 (9th Cir. 1982). *See also, Ennia General Insurance Co. v. V&W Seafood,* 1987 A.M.C. 1494 (C.D. Cal. 1985) (not officially reported) (Punitive damages proper under federal maritime law only where act is not only deliberate and unreasonable, but done with malicious and wrongful intent.)

The Court's recent decision in *Cheek v. United States,* __ U.S. __, 111 S.Ct. 604 (1991), lends support to the view that a good faith belief in non-liability precludes a finding of willful misconduct. *Cheek* dealt with the definition of "willfulness" for purposes of determining liability under the criminal tax statutes. In that context, the Court noted that the standard for the statutory willfulness requirement is the "voluntary intentional violation of a known legal duty," and ruled that a good faith misunderstanding of the law or a good faith belief that one is not violating the law negates willfulness, whether or not the claimed belief or understanding is objectively reasonable. This same standard should apply to a

shipowner's liability for punitive damages for a "willful" failure to provide maintenance and cure.

As a result of the refusal of the court below to charge the jury that Frota's good faith belief in its nonliability, or its good faith misunderstanding of the law, precluded a finding of "willful" or "arbitrary" refusal to pay under *Vaughn*, there is no proper finding of liability on Frota's part sufficient to justify an award of punitive damages in any form. In addition to creating an injustice in this individual case, the decisions below inject further confusion into the maritime law.

b) The State Court Is In Conflict With The Second Circuit

This case of admiralty and maritime jurisdiction was tried in the New York State courts under the "Savings to Suitors Clause" of the Judiciary Act of 1789, which entitles a claimant possessed of an *in personam* claim in admiralty to bring suit, at his election, in the state courts. 28 U.S.C. §1333 (1949) (corresponds to the Judiciary Act of 1789, Section 9, 1 Stat. 76-77).

A state court is obliged to apply the federal maritime law as that law is defined by the Circuit Court having jurisdiction in the state. The Second Circuit encompasses New York State.

The New York State courts below have refused to apply the uniform federal maritime law as defined by the Second Circuit Court of Appeals. The Second Circuit has ruled that an award of punitive damages under *Vaughn* requires bad faith, and that punitive damages under *Vaughn* are limited to attorneys' fees. *Kraljic v. Berman Enterprises*, 575 F.2d 412 (2d Cir. 1978). The courts below have rejected the restrictions imposed by the Second Circuit by not instructing the jury to consider Frota's good faith belief in its nonliability, and by

permitting the second jury to render a verdict awarding $24,000,000.00 in exemplary punitive damages, in addition to attorneys' fees.

The Constitution intended federal admiralty law to be "a system of law coextensive with, and operating uniformly in, the whole country." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, at 402, quoting *The Lottawana*, 21 Wall 558 (1875). The decisions below create conflict within the Second Circuit, in an area where conflict already exists among the Circuits. The Court should grant certiorari to restore a single, national uniform rule regarding the availability of punitive damages in maintenance and cure cases, and establish uniformity and predictability in the domestic and international maritime industry.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review that portion of the order of the New York Supreme Court Appellate Division, First Department which affirmed the judgment of the New York Supreme Court.

Respectfully submitted,

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April 15, 1991

APPENDIX

APPENDIX A

S.M. PIRES et al.,

Plaintiffs-Respondents,

- v. -

FROTA OCEANICA BRASILEIRA, S.A., et al.,

Defendants-Appellants,

Galveston Wharves d/b/a Port of Galveston, et al.,

Defendants.

S.M. PIRES et al.,

Plaintiffs-Respondents,

v.

FROTA OCEANICA BRASILEIRA, S.A.,

Defendant-Appellant,

Eduardo Lopez as executor for the estate of Fernando Frota, et al.,

Defendants.

Supreme Court, Appellate Division, First Department.

May 1, 1990.

Before KUPFERMAN, J.P., and ASCH, WALLACH, SMITH and RUBIN, JJ.

MEMORANDUM DECISION

Order, Supreme Court, New York County (Edward J. Greenfield, J.), entered June 11, 1987, which denied defendants-appellants' motion for summary judgment dismissing the amended complaint, unanimously reversed, on the law, the motion granted and the first, second and fourth causes of action in the amended complaint dismissed, without costs.

Judgment, Supreme Court, New York County (Edward J. Greenfield, J.), entered October 21, 1988, upon a special jury verdict in favor of plaintiff S.M. Pires, solely on his cause of action for maintenance and cure against defendant Frota Oceanica Brasileira, S.A., in the sum of $1,323,666.70 (less $10,000 credited pursuant to stipulation of the parties) with interest to the verdict totalling $126,887.83 and interest from the verdict to October 20, 1988 totalling $39,031.10 together with costs and disbursements, unanimously modified, on the law, to delete the award of $126,887.83 in pre-judgment interest and otherwise affirmed, without costs.

Plaintiffs allege that on December 11, 1975, several hours after the Brazilian cargo vessel M/V Frotaleste docked in the Port of Galveston, plaintiff S.M. Pires, a merchant seaman employed as a wiper on the ship, went ashore to buy work gloves which were not available on board and were necessary for him to avoid skin burns on his hands from solvents used in the course of his work. At about 8:15 P.M., while walking south on 37th Street, which bisected a railroad yard, he was struck by a railroad hopper car, which was standing on and partially blocking 37th Street. The accident occurred as plaintiff was crossing the tracks when, suddenly and without warning, the railway car was caused to move backwards by a locomotive owned and operated by the Port of Galveston, which was engaged in the process of making up a train. As a result, plaintiff sustained severe and permanent injuries resulting in the amputation of his left leg.

Assuming the truth of the above allegations and assuming, for purposes of this motion, that defendants-appellants, individually or collectively, engaged in the operation of M/V Frotaleste and are, therefore, Jones Act (46 USC § 688) employers within the meaning of *Hellenic Lines Limited v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed 2d 252, and its progeny and that plaintiff was on ship's business at the time of the accident, defendants-appellants are,

nevertheless, entitled to summary judgment dismissing the causes of action against them.

"Although an injury occurring ashore may be in the course of the seaman's employment, he cannot recover, in a Jones Act cause of action, unless he proves that the injury was caused by the negligence of any of the officers, agents or employees of the shipowner, for negligence of the shipowner or his agents is the gravamen of the Jones Act." (Norris, *The Law of Seamen* (4th ed.) § 30:31, p. 439 [footnotes omitted].)

Viewing plaintiffs' allegations in their most favorable light, we are left with the alternative theories that the Frotaleste was unseaworthy because it did not provide protective gloves for plaintiff; that he was therefore compelled to go ashore on his own to buy them; and, that, in permitting plaintiff to go ashore in a port with which he was unfamiliar, the ship's officers were negligent in not warning plaintiff of the dangers inherent in a railyard and in not providing him with a flashlight with which to traverse the darkened port area.

However, in order to sustain a cause of action for negligence, even one judged by the liberal standards of the Jones Act under which any negligence on the part of an employer, however slight, is sufficient to fix liability for a seaman's injuries, there must be a causal relationship between the alleged negligence and such injuries. (Norris, *The Law of Seamen, supra,* § 30:34). Thus, in order to recover under the Jones Act, a seaman must prove the existence of a duty, the negligent violation of this duty by his employer and a causal relationship of the violation to the injury sustained (*Id.*, p 460).

In the instant case, there is neither a sufficient showing of any violation of defendants-appellants' duty of care, nor any evidence that such violation, if any, was the proximate cause of plaintiff's injuries. A very similar situation was presented in *Wheeler v. West India S.S. Co.*, 103 F.Supp. 631, *affd.* 205

F.2d 354, *cert. den.* 346 U.S. 889, 74 S.Ct. 141, 98 L.Ed 393 where a seaman was returning at 2:00 A.M. from shore leave to his ship, which was docked at the end of a viaduct. It was very dark at the time and, as he jogged along to catch up with his shipmates, he was struck by a tender attached to a locomotive which was coasting backwards down the viaduct. As a result, the seaman lost both legs. In setting aside a jury verdict in favor of the plaintiff and entering judgment for defendant, the court concluded that even if an inspection of the viaduct by the ship's master, at the time of docking, would have disclosed that the walkways were damaged, that the railroad tracks were set flush with the viaduct's surface, that there were railroad cars on those tracks at the viaduct's offshore end and, possibly, that the viaduct lacked lighting facilities, such inspection would not have disclosed that a locomotive would be operating thereon, negligently or otherwise, at night. Likewise, in the instant case, even if it were found that the Frotaleste was unseaworthy or the shipowners were negligent in sending plaintiff ashore in an unfamiliar port at night without a flashlight, there is no evidence from which a jury could reasonably conclude that due diligence on the part of the shipowners or their employees could have prevented the allegedly negligent operation of the locomotive by the Port of Galveston. The contention that plaintiff was ashore on ship's business rather than for his own purposes does not alter the applicable standards of care or the requirement of a causal relationship between any negligence and plaintiff's injuries. Absent such causal relationship, plaintiff's causes of action for negligence under the Jones Act or, in the alternative, under the maritime law concept of unseaworthiness, as well as his wife's cause for loss of consortium must fall.

As to plaintiff's recovery for maintenance and cure, a no-fault concept, we find no reason to disturb the trial court's finding that differences between Brazilian law and United States law should be disregarded because Brazilian and United

States law on the subject are substantially identical, which conclusion was based on competent evidence at trial and in post-trial submissions. The record also supports the jury's award of $957,666.70 for future maintenance and care [sic] as an amount for a period, albeit lengthy, which can be definitely ascertained (*See, Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 531-32, 58 S.Ct. 651, 654-55 82 L.Ed. 993) and is sufficient to allow the plaintiff to be "so far cured as possible." (*Farrell v. United States*, 336 U.S. 511, 518, 69 S.Ct. 707, 711, 93 L.Ed. 850). Similarly, the jury's finding that the shipowner willfully, callously or arbitrarily withheld maintenance and cure was primarily factual in nature and was clearly not erroneous (*See, Legros v. Panther Services Group, Inc.*, 863 F2d 345, 352). However, since the question of pre-judgment interest, a factual issue in admiralty cases, was not presented to the jury, the trial court was without authority to fix an amount and we, therefore, delete such award. (*Morales v. Garijak, Inc.*, 829 F2d 1355, 1361; *Havis v Petroleum Helicopters, Inc.*, 664 F2d 54, 55).

We have considered defendant Frota's other arguments on the issue of maintenance and cure and find them to be without merit.

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS: PART 4

S.M. PIRES and VIRGINIA PIRES, his wife,	:	
Plaintiffs,	:	
- against -	:	Index No. 23829/76
FROTA OCEANICA BRASILEIRA, S.A., et al.,	:	
Defendants.	:	

GREENFIELD, J.:

In this seaman's action for maintenance and cure, brought by a Brazilian crew member of defendant's vessel for injuries sustained in a United States port, as a result of which at the age of 21 he lost his right leg and severely damaged his left leg, and after amputation proceeded to New York for rehabilitation, the defendant shipowner moves to set aside the jury's verdict awarding the plaintiff maintenance and cure. All post-trial motions are consolidated for disposition herein.

Plaintiff sued the shipowner under the Jones Act and under general maritime law, and sued the Port of Galveston, which operated the railroad engine that severed plaintiff's leg, for negligence.

As there were many procedural problems and problems of proof in the Jones Act and negligence aspects of the case, the court acceded to the request to sever and try the issue of

maintenance and cure under the general maritime law. Cf. Parker v. Texaco, Inc., 549 F. Supp. 71.

The right to maintain such a claim exists even if not explicitly pleaded in the complaint. The Magdapur, 3 F. Supp. 971; The Teviotdale, 166 F. 481. "Courts of admiralty have always liberally entertained jurisdiction on the plea of a seaman for maintenance and cure . . . It is based upon the necessity to prevent a failure or miscarriage of justice" and "results in much liberality of remedy". The Montezuma, 19 F. 2d 355. In the latter case the right to recover for maintenance and cure was held to survive even though not pleaded or argued below. Accordingly, this court had the simpler issue of maintenance and cure proceed to a jury trial, and this decision was affirmed by the Appellate Division. Pires v. Frota Oceanica, 130 AD 2d 986.

Maintenance and cure is a right granted to seamen under the general maritime law recognized by all nations, and dating back to the Middle Ages. It is a right to have necessary medical care provided until the point of maximum recovery and maximum medial benefit is reached, together with the requisite food and lodging needed during recovery. Maintenance and cure (or care) must be provided irrespective of the presence or absence of negligence on the part of the seaman or the shipowner. It is the earliest developed concept of "no-fault".

Justice Story analyzed the reason for requiring the provision of maintenance and cure for seamen back in 1823:

> "Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports

> suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. * * *
>
> "On the other hand, if these expenses are a charge upon the ship, the interest of the owner will be immediately connected with that of the seamen. . . He will never be tempted to abandon the sick to their forlorn fate, but his duty . . . will lead him to succor their distress, and shed a cheering kindness over the anxious hours of suffering and despondency." Harden v. Gordon, 11 Fed.Cas. 480, 483.

After trial on the vigorously contested issues of what treatment was needed to treat plaintiff's mangled and severed leg, what was the point of maximum cure, whether plaintiff was justified in seeking treatment in New York, and the sums required for medical treatment and for food and lodging, the jury awarded plaintiff a verdict totaling $1,323,666.70. The jury was requested to, and answered eight questions on which the special verdict was based. The questions, and the jury's answer were:

"1. Was plaintiff injured in the service of the ship? A. YES

2. Has plaintiff reached a point of maximum cure? A. NO

3. In seeking rehabilitation and cure did plaintiff act reasonably under the circumstances as they appeared to him in going to Rusk Institute in New York? A. YES

4. Should the shipowner be required to pay the expenses for rehabilitation and cure incurred in treatment in New York? A.YES

5. Did the shipowner furnish plaintiff required maintenance and cure? A. NO

6. What are the amounts, if any, for medical treatment and cure not supplied by the shipowner.

a. From December 11, 1975 to date? A. $6,000

b. For the future? A. $957,666.70

7. Did the shipowner provide required maintenance to the plaintiff? A. NO

What are the amounts, if any, due the plaintiffs:

a. December 11, 1975 to present? A. $200,000

b. For the future? A. $160,000

8. Did the shipowner willfully, callously, or arbitrarily withhold maintenance and cure from the plaintiff? A. YES

Defendant has moved to set aside the verdict on the grounds that the recovery would be barred under Brazilian law; that the award should not have covered sums incurred once the seaman was discharged from the Texas hospital where he was first treated; and that there was no basis for an award covering future medical expenses.

Authority of Court to Provide Remedy of Maintenance and Cure to Foreign Seamen Injured in the United States

It is the contention of defendant, a Brazilian corporation operating a Brazilian flag vessel, that the rights of the seaman employed by it to recover maintenance and cure must be based upon Brazilian, rather than United States law. Defendant did not, in its answer plead a defense of Brazilian law, and this

court denied its motion to strike plaintiff's not formally pleaded maintenance and cure claim from the trial calendar.

Defendant has submitted the affidavit of an expert in Brazilian law to effect that an employer under that law would be required to pay an injured seaman his wages for the first fifteen days of his disability and his medical or hospital expenses until his return to Brazil, when the employer's responsibility is terminated and his care is then undertaken by the National Health Service of Brazil. Plaintiff, on the other hand, has submitted an affidavit by his expert on Brazilian law to the effect that Brazil, like continental European states, and like the United States, has adopted the general maritime law which is descended from the ancient codes of the sea, and which is embodied and recognized in its legislative enactments.

Article 560 of the Brazilian Commercial Code provides that the curing of an illness is for the account of the vessel. A leading commentator has written that "the obligation of the shipowner to give medical assistance to the personnel of the crew is traditional and comes from time immemorial. . . The Brazilian code does not establish the time during which there should continue the obligation to cause the providing of treatment of the ill crew member. . . The text of our Code can be interpreted so as to attribute to the shipowner responsibility to the crew member until a complete recovery is achieved." J.C. Sampaio de Lacerda, *Curso de Dereito Privado da Navegacao*, (Vol. I, *Dereito Maritimo*, 3rd Ed., 1984.)

While the provisions of Article 560 have never been revoked, Brazil affords additional rights to Social Security benefits, but these do not bar the right to recover under Article 560.

The fact that the health and medical needs of a patient may have been handled differently had he been treated in Brazil and under the Brazilian National Health Service is of no

moment. That is an internal domestic program, not applicable to expatriates. It has no facilities outside Brazil and has no extra-territorial effect.

The plaintiff's injury was sustained in the United States, and he chose to be treated here, and to live here while being treated, a decision the jury found to be a reasonable one. This decision was founded on the evidence in the record that the medical rehabilitation services and prostheses available in the United States for an amputee are materially superior to those available had he gone back to Brazil. In fact, the testimony indicated that when the Brazilian Air Force had to deal with amputees, it sent them for treatment to the same place plaintiff went — to the Rusk Institute in New York.

Defendant has argued that while the injury was sustained in the United States, there would have been lesser entitlements under Brazilian law (from the employer for 15 days, then 10% of the monthly minimum wage at the place of treatment, paid by the Social Security System). CPLR 3016(e) requires that where the law of a foreign country is involved which would produce a different result than U.S. law, its substance must be pleaded. Defendant contends that even though it had not explicitly pleaded Brazilian law as a defense, plaintiff and the court were on notice that it would ask to have judicial notice taken of Brazilian law.

Even though not in compliance with CPLR 3016(e), the court will not consider that defendant's failure to plead foreign law is to be deemed final. See, Practice Commentary, McKinney's Sec. C3016:8, p. 76. Since there was no prejudice or surprise, this issue will not be determined on any narrow view of the adequacy of the pleading. Defects in pleading may be ignored if a substantial right of a party is not prejudiced, CPLR 3026. The court would prefer to deal with defendant's contention on the merits.

Plaintiff has submitted an affidavit from its own expert on Brazilian law to the effect that the Brazilian doctrine of maintenance and cure is identical to our own. We are dealing here with a foreign seaman who was injured in a United States port, and whose leg having been amputated, sought continuing treatment in the United States where he had been residing for eleven years at the time of the trial.

Under general maritime law, if adequate care has not been provided, the shipowner must pay for the private medical treatment chosen by the seaman. Jones v. Reagan, 748 F. 2d 1331; Kratzer v. Capital Marine Supply, Inc., 645 F. 2d 477, 482; Keiser v. American President Lines, Ltd., 384 F. Supp. 554. An award may properly be based on American costs and standards if there is evidence which may lead a jury to conclude that a foreign seaman would not receive adequate medical care in the land of his birth. Sosa v. M/V Lago Izabal, 736 F. 2d 1028, 1034. Plaintiff's rights in this country, where he has resided continuously since leaving the ship, are not to be governed by the internal provisions of the Brazilian Society Security System. His expenses were incurred in New York, not in Rio de Janeiro.

Maintenance and cure is an ancient remedy provided to seamen under the international law of the sea. It is not a creature of United States law. The ancient origins of the doctrine of maintenance and cure, promulgated under the Rules of Oleron, the Law of Wisby, and the Laws of the Hanseatic League have been traced in great detail by the United States Supreme Court in The Osceola, 189 U.S. 158 (1903) and Aguilar v. Standard Oil, 318 U.S. 724 (1943). As noted therein, the Rules of Oleron, from which most maritime law is descended, provided that "if by the master's orders and commands any of the ship's company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the costs and charges of the said ship." 189 U.S. at p. 169. See Norris, The

Law of Seamen, 4th Ed., Vol. 2, Secs. 26.3 to 26.6. The Supreme Court expressly noted the cognate provisions to be found in the Brazilian, Chilean, Argentine, Portuguese and Spanish codes. Article 560 of the Brazilian Code, which is still in effect, unmodified and unrescinded, was explicitly referred to as exemplifying the ancient doctrine of maintenance and cure. (189 U.S. at p. 170). Indeed, the general maritime law, as distinguished from U.S. statutory law, is "a non-national or international law of impressive maturity and universality". Lauritzen v. Larsen, 345 U.S. 571, pp. 581-582.

The law books are replete with the cases of foreign seaman serving aboard foreign flag vessels who sustain injuries in international waters or in U.S. ports and who are awarded recoveries in United States courts under general maritime law. The Magdapur, 3 F. Supp. 1971 (Singhalese seaman aboard a British vessel); The Teviotdale, 166 F. 2d 481 (Norwegian seaman on British ship); Adbul Samad v. SS Etivebank, 134 F. Supp. 530 (Pakistani crew member on British ship, damages assessed under the law of the country where the injury was suffered); Gkiafis v. S.S. Yiosonas, 387 F. 2d 460 (Greek seaman on Greek ship). Seaman are considered wards of the court, and occupy favored status. See, for example Cortes v. Baltimore Insular Line, 287 U.S. 367.

The seaman's right to maintenance and cure has been declared to be the "most pervasive" right of all, not to be defeated by restrictive distinctions nor to be "narrowly confined". Aguilar v. Standard Oil, supra p. 735. Recovery of maintenance and cure by the seaman sick or injured in the service of the vessel absent willful misbehaviour is a virtual certainty. It has been called an "unbeatable right". Bay State Dredging & Contr. Co. v. Porter, 153 F. 2d 827. It cannot be limited or abrogated by agreement between the parties. De Zon v. American President Line, 318 U.S. 660, 667; Cortes v. Baltimore Insular Line, supra.

The Obligation to Provide Maintenance and Cure Continues Until a Point of Maximum Medical Cure is Reached.

The right to recover for maintenance and cure, though easily established, is limited in scope. It does not include compensatory damages for pain and suffering or for the disability itself, unless caused by the shipowner's failure to provide it. The shipowner here has taken the position that once an injury is declared permanent, the obligation to provide maintenance and cure is at an end. In this case, defendant contends that once plaintiff's leg had been amputated there was no further hope, all medical efforts would be futile, and all further responsibilities on its part ceased.

The medical testimony in the case, however, indicated sharp dispute as to the point of maximum cure. Obviously, the obligation to provide medical treatment goes beyond emergency First Aid. Plaintiff's doctors, who were in charge of his treatment, testified that after the amputation, as an amputee he had to get continued psychological treatment and support (cf. Parker v. Texaco, Inc. 549 F. Supp. 71, where the plaintiff, being treated for hypertension and psychiatric problems, was found not to have reached "maximum cure"). The medical testimony on Pires was that physically he would not reach a point of maximum cure until he was able to walk without support and without dragging. According to Dr. Dong San Chu, an eminent specialist in Physical Rehabilitation at the Rusk Institute, the prosthetic device used would have to be continually adjusted to account for stump shrinkage, and would have to be replaced every 1 1/2 to 2 years. He declared intensive rehabilitation physically, socially, vocationally, and psychologically was still required. Defendant's doctors, Dr. Balensweig and Dr. Evans, contended that further treatment would not change plaintiff's basic condition, but agreed the prosthesis would have to be changed regularly, and the resultant depression would have to be treated as well. Having

heard the contentions of both sides, the jury concluded that the plaintiff had not reached a point of maximum cure up to the time of trial, and would require substantial medical treatment in the future.

Defendant relies on the doctrine enunciated by the United States Supreme Court in Calmar S.S. Corp. v. Taylor, 303 U.S. 525 (1938) and Farrell v. U.S., 336 U.S. 511 (1949) that the shipowner's obligation continues until the sick or injured person has been cured, or the sickness or incapacity has been declared of a permanent character. It argues further that continuing treatment must in fact be curative, and not "merely beneficial" or palliative, and that treatment which helps the seaman improve or prevents deterioration of the condition is not part of maintenance and cure. While it is undoubtedly correct that the fact that an injury is permanent does not, of itself, entitle the seaman to maintenance and cure for life (Farrell v. U.S., supra; Luksich v. Misetich, 140 F. 2d 812, 814, cert. den. 322 U.S. 761 [1944]; Myles v. Quinn Menhaden Fisheries, Inc., 194 F. Supp. 197, 200, aff'd. 302 F. 2d 146), the real question is whether further medical treatment is required. His entitlement continues until care and nursing would not longer benefit him and "the maximum possible restoration has been accomplished". Shields v. United States, 175 F. 2d 743, cert. den. 338 U.S. 899; Page v. United States, 177 F. 2d 601. We surely have come far beyond the days of Long John Silver, who was fitted with a peg-leg for his stump, and left to shift for himself.

The question of when the point of maximum cure has been reached is particularly a medical, and not a legal question. This is a question of fact to be determined on the basis of the evidence presented. Korbut v. Keystone Shipping Co., 380 F. 2d 352; Stanovich v. Jurlin, 227 F. 2d 245; Bradt v. United States, 221 F. 2d 325. The jury heard the medical experts and concluded that maximum medical cure had not yet been reached, that the initial prosthesis originally supplied was

inadequate and had caused further damage to the remaining stump, and that further medical treatment would be required for the future. Plaintiff's expert testified that the sums required for past and future medical treatment would come to $3,017,437. The jury awarded one third that amount.

Great strides have been made in the techniques of rehabilitation in the past few years, so that one previously doomed to permanent disability can, with proper treatment, partially restore the shattered fragments of his life. An amputee need no longer just shrug his shoulders and accept his bitter fate. He is not to be left to his own devices because his condition has become hopeless. The hopeless case, if not totally curable, can be treated and the condition improved. If it can be improved, further treatment is warranted. The jury so found.

The Jury Award for Past and Future Maintenance and Cure was Supported by the Record.

The shipowner's obligation to provide maintenance under the general maritime law goes hand in hand with the duty to provide care and cure to the sick or injured seaman. Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 528. The purpose of maintenance is to protect poor or improvident seaman while they are being treated in a foreign port. Vella v. Ford Motor Co., 421 U.S. 1, 3-4. Defendant has taken the position that an award can be made for maintenance only if the plaintiff has produced actual, detailed records of what he spent for food and lodging. That is not the case. Shipowners have been quick to press on the courts the amounts set forth for subsistence in union contracts as limiting the recovery for maintenance, despite proof that a seaman may have in fact spent more.

The amount and duration of maintenance to be awarded is essentially a question of fact. Caulfield v. AC & D Marine, 633 F. 2d 1129, 1132. It is not unreasonable to refer the jury

to agreed contract rates for subsistence, or to actual cost of living, rather than limiting an unlettered and unsophisticated seaman to a recovery based only on the scraps of receipts and records he may fortuitously maintained.

> "The amount necessary to ensure that a seaman receives appropriate maintenance and cure will vary according to the nature of his injury, the recovery process, and the place in which he is required to convalesce. Evidence of a seaman's actual expenses during his incapacity is a relevant starting point in this fact-specific inquiry, but it is not necessarily a sufficient finish line. Actual expenses do not always provide a satisfactory benchmark, because in many cases a seaman may not have sufficient funds to obtain the kind of maintenance the law provides him. *** The fact that a seaman is actually able to live on a pittance, however, does not limit him to that recovery. . ." McWilliams v. Texaco, Inc., 781 F. 2d 514, 518.

A labor economist who was research director for the National Maritime Union testified that subsistence costs for seamen (not including family members) increased from $21 a day to $37 a day, and that New York city had to be calculated at 13% above the national average. A jury, acutely familiar with what it takes to subsist in New York, awarded maintenance of $200,000 for the past 12 years, which comes to just $16,666 a year. (Cf. Incandela, infra, where maintenance award of $26.80 for 1976-1979 was upheld, and Wood v. Diamond M Drilling, 691 F. 2d 1165, cert. den. 460 U.S. 1069, where a Texas court upheld a maintenance award of $30 a day for 1979-1981). In view of such cases as McWilliams, supra, where the trials court's refusal to hear evidence as to reasonable cost of food and lodging in the place where seaman was recovering and limiting recovery only to those expenses actually incurred was reversed, defendant's

contention that without documented proof of actual expenditures there is no showing plaintiff "actually incurred any expenses at all" is simply fatuous.

Reference to cases where no maintenance was awarded because a seaman was taken care of in some institution or by others and incurred no expenses (e.g. Springborn v. American Commercial Barge Lines, Inc., 767 F. 2d 89) have no applicability to the situation here. There is no universal fixed rate for maintenance, and evidence presented by plaintiff as to what are necessary expenditures based on cost of living shifts the burden to the shipowner to prove such costs were excessive and that reasonable alternatives were available. Caulfield v. AC & D Marine, Inc., 633 F. 2d 1129, 1132-1133; Incandela v. American Dredging Co., 659 F. 2d 11. The monetary value to be ascribed to maintenance is a question of fact, and the evidence that can be considered by a court in determining the appropriate award for daily maintenance includes. . . "expert testimony regarding the cost of food and lodging in the area." Rutherford v. Sea-Land Service, Inc., 575 F. Supp. 1365, 1369, mod. o.g. 786 F.2d 943.

Defendant also contests the jury's award of $160,000 for future maintenance, relying on the 1938 holding in Calmar, supra. There the Supreme Court had reversed a lump sum award for future maintenance of a seaman suffering from a progressive and deteriorating condition, holding that the maintenance had to be an award "of small amounts to cover future maintenance and cure of a kind and for a period definitely ascertained or ascertainable." Id. p. 532. When the court in Calmar spoke of "small amounts", it should be remembered that a minimum wage was $12 a week and that one could subsist at a fraction of today's costs.

Similarly, in Farrell v. United States, 336 U.S. 511, lifetime maintenance was denied for a seaman who had become blind, although not barring further proceedings if further

medical treatment were required. The foreseeable period contemplates such time as is evidenced by the testimony of competent medical witnesses. Chesser v. General Dredging Co., 150 F. Supp. 592. In this case we have express medical testimony that future treatment and replacement of the prosthesis will be periodically required. (One of defendant's medical experts projected every 6 to 8 years, the other 18 to 24 months). "When the award is supported by physician's testimony courts have granted future maintenance". Lirette v. K & B Boat Rentals, 579 F. 2d 968, citing Domeracki v. Gulf Oil Corp., 342 F. 2d 219. If the jury's verdict was "within the universe of possible awards which are supported by the evidence" there is no basis for disturbing it. Bonura v. Sea-Land Service, Inc. 505 F. 2d 665; Miles v. Vicksburg Chemical Co., 588 F. 2d 512, 517. The jury here did not award a life pension to plaintiff. It provided funds just sufficient for the next four years. Under the circumstances, it would not have been necessary to relegate the plaintiff to having to commence a new action every two years or so.

Upon Refusal to Pay Maintenance and Cure, a Ship Owner May be Subject to Damages for Aggravating a Condition, and for Attorneys' Fees and Punitive Damages

In Vaughan v. Atkinson, 369 US 527, (1962), the United States Supreme Court, dealing with the duty of the ship owner to provide maintenance and cure when the seaman was incapacitated until the point of maximum medical recovery, held that where the shipowners were "callous in their attitude", neither admitting nor denying the seaman's claim and compelling him to hire a lawyer and go to court to get what was plainly owed under laws centuries old, it would be "difficult to imagine a clearer case of damages suffered for failure to pay maintenance and cure." See also, Robinson v. Pocahantas, 477 F. 2d 1048, where the charge of the trial court

permitting the jury to consider an award of punitive damages was approved.

In this case the jury made an express finding that the shipowner "willfully, callously, or arbitrarily" withheld maintenance and cure from the plaintiff. This gives rise to claims for further damages. Not only is a seaman who is denied proper maintenance and cure permitted to recover legal expenses and punitive damages, but he may recover consequential damages as well, for the suffering and physical handicaps incurred because of the failure to give timely maintenance and cure. Gaspard v. Taylor Diving & Salvage Co., 649 F. 2d 372, 376; Blanchard v. Cheramie, 485 F. 2d 328; United States v. Sims, 186 F. 2d 972, cert. den. 342 U.S. 816.

> "If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has his right of action for the injury thus done to him, the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt. The Iriquois, 194 U.S. 240." Cortes v. Baltimore Insular Lines, 287 U.S. 367.

Plaintiff also claims that he is entitled to have prejudgment interest added to the jury's award, citing Gillmore [sic] & Black, *The Law of Admiralty*, 1975 ed., p. 314. In a maintenance and cure case, the federal maritime rule rather than the ordinary rule of state law prevails, and the awarding of such interest, while discretionary, is the rule rather than the exception. Billiot v. Toups Marine Transport, Inc., 465 F. Supp. 1265; Belaire v. Mobile Oil Co., 709 F. 2d 1031; SCNO Barge Lines v. Sun Transport, 775 F. 2d 221. Judgment may be entered accordingly. Given the jury's findings, plaintiff may also pursue the appropriate remedy to recover the consequential damages which flow from the

unwarranted refusal to provide that which he was legally entitled to.

The foregoing constitutes the decision and order of the court.

Dated: July 27, 1988

/s/
J. S. C.

Filed July 28, 1988
County Clerk's Office, New York

APPENDIX C

Recorded Transcript Excerpt from Justice Greenfield's Charge to the Jury

Jury Charge

* * *

There is one other question which is added, in view of the controversy here, and the claim by the plaintiff that the failure by the ship owner to pay for the prosthetic devices as they were needed, and for the medical care, aggravated and prolonged condition, and so we will all like you to answer the question, which is the last question on my list, did the ship owner willfully, callously or arbitrarily withhold maintenance and cure from the plaintiff. Was there a reasonable basis in justification for doing so, or was it arbitrary and without regard to the needs of the seaman. You may answer that question.

As to any of these question, ladies and gentlemen, we would hope that you would be unanimous after you discuss these issues, but if you cannot be, the verdict that five out of six of you will suffice, will constitute the verdict of the jury. It doesn't have to be the same five on every question. Five of you can agree on one, and a different five can agree on another.

(See Record at pages 1658-1659)

* * *

APPENDIX D

New York Supreme Court
County of New York

S.M. PIRES AND VIRGINIA PIRES, his wife

- against -

FROTA OCEANICA BRASILEIRA, et al.,

INDIVIDUAL CALENDAR PART 22

PRESENT: HON. EDWARD J. GREENFIELD
Justice.

Upon the foregoing papers this motion for partial summary judgment on the cause of action for maintenance and cure is denied. The complaint in this action does not contain a cause of action for maintenance and cure, which is a form of compensation given by the General Maritime Law to a seaman who falls ill or is injured while in the service of a vessel, *Evans v. Blindberg Rothchild Co.*, 382 F. 2d 637. Moreover, the moving papers would be insufficient to justify the relief requested even if such a claim were alleged. Plaintiff has failed to set forth any facts to show that defendants are liable for maintenance and cure under United States Law. Plaintiffs' contention that defendants are collaterally estopped from contesting liability, which is based on the denial of a motion to dismiss for failure to state a cause of action in another action brought by a different plaintiff against the same defendants, is without merit. The denial of a motion to dismiss for failure to state a cause of action is not determinative of ultimate liability. In any event, that portion of the order, inter alia, denying the motion to dismiss relied on by plaintiff has been reversed by the Appellate Division, First Department.

/s/

J.S.C.

APPENDIX E

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifteenth day of January A.D. 1991

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

Mo. No. 1340

S.M. Pires and Virginia Pires,
his wife,

Respondents,

v.

Frota Oceanica Brasileira, S.A.,

Appellant,

et al.,

Defendants.

A motion for reargument to the Court of Appeals &c. [sic] in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX F

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-seventh day of November A.D. 1990

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

1-14 Mo. No. 903

S.M. Pires and Virginia Pires,
his wife,

Respondents,

v.

Frota Oceanica Brasileira, S.A.,

Appellant,

et al.,

Defendants.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

/s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX G

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on July 26, 1990

Present - Hon. Theodore R. Kupferman Justice Presiding
Sidney H. Asch
Richard W. Wallach
George Bundy Smith
Israel Rubin Justices

S.M. Pires and Virginia Pires, his wife,

Plaintiffs-Respondents,

against

Frota Oceanica Brasileira, S.A., M-2076

Defendant-Appellant, [39076]

Eduardo Lopez, et al.,

Defendants.

Defendant-appellant having moved for leave to appeal to the Court of Appeals from the order of this Court entered on May 1, 1990,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion be and hereby is denied. (See M-2465, decided simultaneously herewith.)

ENTER:

/s/ Francis X. Galdi
Clerk

APPENDIX H

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 1, 1990.

Present - Hon. Theodore R. Kupferman, Justice Presiding
Sidney H. Asch
Richard W. Wallach
George Bundy Smith
Israel Rubin Justices.

----------x

S.M. Pires and Virginia Pires, his wife,

Plaintiffs-Respondents,

- against -

Frota Oceanica Brasileira, S.A., Eduardo Lopez as executor for the estate of Fernando Frota, Omnium Transportation Co. (Liberian Corp.), Omnium Agencies, Inc., J. Dixon Byrne as executor for the estate of James Byrne, 39075

Defendants-Appellants,

Galveston Wharves d/b/a Port of Galveston, Board of Trustees of Galveston Wharves and City of Galveston d/b/a Port of Galveston,

Defendants.

----------x

An appeal having been taken to this Court by the above-named appellants, from an order of the Supreme Court, New York County (Edward Greenfield, J.), entered on June 11, 1987, which denied defendants-appellants' motion for summary judgment dismissing the amended complaint,

And said appeal having been argued by Joseph F. DeMay, Jr., [sic]* of counsel for the appellants, and by Kenneth Heller, of counsel for the respondents; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same is hereby reversed, on the law, without costs and without disbursements, the motion granted and the first, second and fourth causes of action in the amended complaint dismissed.

ENTER:

FRANCIS X. GALDI

Clerk.

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* Original order should read "argued by Thomas E. Stiles."

APPENDIX I

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 1, 1990.

Present - Hon. Theodore R. Kupferman, Justice Presiding
Sidney H. Asch
Richard W. Wallach
George Bundy Smith
Israel Rubin Justices.

----------x

S.M. Pires and Virginia Pires, his wife,

Plaintiffs-Respondents,

- against -

Frota Oceanica Brasileira, S.A.,

Defendant-Appellant, 39076

Eduardo Lopez as executor for the estate of Fernando Frota, Omnium Transportation Co. (Liberian Corp.), Omnium Agencies Inc., J. Dixon Byrne as executor for the estate of James Byrne, Galveston Wharves d/b/a Port of Galveston, Board of Trustees of Galveston Wharves and City of Galveston d/b/a of Galveston,

Defendants.

----------x

An appeal having been taken to this Court by the above-named appellant, from a judgment of the Supreme Court, New York County (Edward Greenfield, J.), entered on October 21, 1988, upon a special jury verdict in favor of

plaintiff S.M. Pires, solely on his cause of action for maintenance and cure against defendant Frota Oceanica Brasileira, S.A., in the sum of $1,323,666.70 (less $10,000 credited pursuant to stipulation of the parties) with interest to the verdict totalling $126,887.83 and interest from the verdict to October 20, 1988 totalling $39,031.10 together with costs and disbursements.

And said appeal having been argued by Thomas E. Stiles, of counsel for the appellant, and by Kenneth Heller, of counsel for the respondents; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein.

It is unanimously ordered that the judgment so appealed from be and the same is hereby modified on the law, to delete the award of $126,887.83 in prejudgment interest and otherwise affirmed, without costs and without disbursements.

ENTER:

FRANCIS X. GALDI

Clerk.

APPENDIX J

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 4

----------x

S.M. PIRES and
VIRGINIA PIRES, his wife,

Plaintiffs,

- against -

FROTA OCEANICA BRASILEIRA S.A., FERNANDO FROTA, OMNIUM TRANSPORTATION CO. (Liberian Corp., OMNIUM AGENCIES INC., JAMES BYRNE, GALVESTON WHARVES d/b/a PORT OF GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES and CITY OF GALVESTON d/b/a PORT OF GALVESTON,

Defendants.

Index No.:
23829/76

Calendar No.:
82141

JUDGMENT AFTER JURY TRIAL ON CAUSE OF ACTION FOR MAINTENANCE AND CURE

----------x

The issues on plaintiff, S.M. PIRES' cause of action for maintenance and cure against defendant, FROTA OCEANICA BRASILEIRA, S.A., having been severed and having come on for trial before Mr. Justice Edward J. Greenfield, and a jury, at I.A.S. Part 4 of this court at the courthouse at 60 Centre Street, New York, New York, on June 17, 18, 19, 22, 24, 25, 26, 29 and July 1 and 2, 1987; and

Plaintiff, S.M. PIRES, having appeared by his attorney, Kenneth Heller, Esq. and

Defendants, FROTA OCEANICA BRASILEIRA, S.A., FERNANDO FROTA, OMNIUM TRANSPORTATION CO. (Liberian Corp.), OMNIUM AGENCIES, INC. and JAMES BYRNE, having appeared by their attorneys, Cichanowicz, Callan & Keane, by Joseph DeMay, Esq. and David Van Oss, Esq. and

Defendants, GALVESTON WHARVES d/b/a PORT OF GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES and CITY OF GALVESTON d/b/a PORT OF GALVESTON, having appeared by their attorneys, Hunton & Williams, by Thomas McMahon, Esq.

And the issues having been duly tried, and the court having requested the jury to answer special questions posed to them on the issues of maintenance and cure which the jury answered on July 2, 1987, upon which a verdict was entered with the Clerk against the shipowner of record, defendant FROTA OCEANICA BRASILEIRA, S.A., and an order having been entered on July 28, 1988 denying the post-trial motions of defendant, FROTA OCEANICA BRASILEIRA, S.A. and ordering that judgment be entered in favor of plaintiff, S.M. PIRES, on the issue of maintenance and cure, reserving all other issues as to actual ownership and control of the vessel, consequential damages for failure to provide maintenance and cure, and attorney's fees under the rule of Vaughan v. Atkinson, 369 U.S. 527 to a subsequent trial on the issues of Jones Act and negligence liability.

NOW, on the aforesaid special verdict and upon the order of this court entered on July 28, 1988 in the office of the Clerk of New York County, and on the motion of Kenneth Heller, Esq., attorney for plaintiff, S.M. PIRES, it is

ORDERED, ADJUDGED AND DECREED, that plaintiff, S.M. PIRES, residing at 237-81st Street, Brooklyn, New York, recovers of defendant, FROTA OCEANICA

BRASILEIRA, S.A., residing at Avenida Venezuela, 110, Rio de Janeiro, Brazil, the principal amount of $1,323,666.70 (less the sum of $10,000.00 credited pursuant to the attached stipulation) with interest to the verdict totaling $126,887.83, and interest from the verdict to October 20, 1988 totaling $39,031.10 together with costs and disbursements taxed in the sum of $4,378.26, totaling $1,483,963.89 and that plaintiff have execution therefore.

Dated: New York, New York
October 20, 1988

/s/ Edward J. Greenfield
J.S.C.

/s/ Norman Goodman
Clerk

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NEW YORK

S.M. PIRES, et ano.,	:	
	:	
Plaintiffs,	:	N.Y. County Clerk's
- against -	:	Index No. 23829/1976
FROTA OCEANICA BRASILEIRA S.A., et al.,	:	STIPULATION
Defendants.	:	

IT IS STIPULATED AND AGREED by and between the undersigned attorneys for plaintiffs and for defendants, FROTA OCEANICA BRASILEIRA, S.A., FERNANDO FROTA, OMNIUM TRANSPORTATION COMPANY, OMNIUM AGENCIES, INC. and JAMES BYRNE ("OMNIUM defendants") that:

1. Payment of $10,000.00 for a new prosthesis and therapy for plaintiff, STARKHEISER PIRES, is not to be considered an admission of liability on the part of any one or more of the OMNIUM defendants.

2. The $10,000.00 shall be credited as of the date paid against the principal amount of any award for medical expenses or cure included in any judgment which might be entered in favor of one or more of the plaintiffs against one or more of the OMNIUM defendants.

3. An order to this effect may be entered by any of the foregoing parties without further notice to any party.

Dated: New York, New York, July 5, 1988

/s/

KENNETH HELLER
335 Broadway 614
New York, New York 10013
(212) 962-6085
Attorney for Plaintiffs

/s/

CICHANOWICZ CALLAN & KEANE
21 West Street, 26th Floor
New York, New York 10006-2908
(212) 344-7042
Attorneys for OMNIUM Defendants

SCHEDULE OF INTEREST CALCULATIONS

Medical Treatment (Cure)
Jury Award $6,000

1. 12-11-75 (injury) to 6-24-81 at 6%
(360 day basis)

5 yrs. 6 mos. 14 days = .33233333

$6,000 x .33233333 = $1,994.00

2. 6-25-81 to 7-2-87 (verdict) at 9%
(360 day basis)

6 yrs. 7 day = .54175

$6,000 x .54175 = $3,250.50

3. Interest to verdict

$1,994.00 + $3,250.50 = $5,244.50

4. Interest on principal plus
pre-verdict interest at 9%
(360 day basis)
from 7-2-87 to 10-20-88.

$6,000 / $5,244.50 = $11,244.50

($11,244.50 x .09) - 360 x 469 days $1,318.42

5. Total interest to date (10-20-88)

$5,244.50 + $1,318.42 = $6,562.92

Maintenance Award
(Weighted Interest)

1. Portion of maintenance award attributed to period 12-11-75 to 6-24-81 and to period 6-25-81 to 7-2-87 based upon 50% increase in daily maintenance cost commencing 6-25-81.

   let X = maintenance for period 12-11-75 to 6-24-81.

   let Y = maintenance for period 6-25-81 to 7-2-87.

   let Y = X + X/2 (represents 50% increase in cost)

   X + Y = $200,000

   X + X + X/2 = $200,000

   4X + X = $400,000

   5X = $400,000

   X = $80,000
   (maintenance attributable to period 12-11-75 to 6-24-81)

   Y = $120,000
   (maintenance attributable to period 6-25-81 to 7-2-87)

2. 12-11-75 to 6-24-81
   (360 day basis)

   5 yrs. 6 mos. 14 days = 1,994 days

3. 6-25-81 to 7-2-87
(360 day basis)

6 yrs. 7 days = 2,167 days

4. Interest on $80,000 from
12-11-75 to 6-24-81 at 6%
based on intermediate date.

($80,000 x .06) - 360 x $1,994 / 2 = $13,293.33

5. Interest on $80,000 (now fully accrued)
from 6-25-81 to 7-2-87 at 9%

($80,000 x .09) / 360 x $2,167 = $43,340.00

6. Interest on $120,000 from 6-25-81 to 7-2-87
at 9% based on intermediate date.

($120,000 x .09) / 360 x $2,167 / 2 = $65,010.00

7. Total pre-verdict interest $121,643.33

8. Post-verdict Interest on principal
plus pre-verdict interest from
7-2-87 to 10-20-88 at 9%

1 yr. 3 mos. 19 days = 469 days

9% of $200,000 + $121,643.33 = $321,643.33

($321,643.33 x .09) / 360 x 469 = $37,712.68

9. Total interest 12-11-75 to 10-20-88 $159,356.01

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:

----------x

S.M. PIRES AND
VIRGINIA PIRES, his wife,

Plaintiff(s)

- against -

FROTA OCEANICA BRASILEIRA S.A.,; FERNANDO FROTA, OMNIUM TRANSPORTATION CO. (Liberian Corp.), OMNIUM AGENCIES., et al

Defendant-Appellant,

----------x

Index No.: 23829/76
Cal. No. 82141

Costs of AMENDED JUDGMENT

COSTS

Costs before note of issue CPLR §8201 subd. 1...	$ 50.00
Costs after note of issue CPLR §8201 subd. 2.....	100.00
Trial of issue CPLR §8201 subd. 3.....	150.00
Allowance by statute CPLR §8302(a)(b).....	
Additional allowance CPLR §8302(d).....	
Motion Costs CPLR §8202.....	
Appeal to Appr. Div. or App. Term before argument CPLR §8203 subd. 1	
Appeal to App. Div. or App. Term for argument CPLR §8203 subd. 2	
Appeal to Court of Appeals before argument CPLR §8204 subd. 1	
Appeal to Court of Appeal for argument CPLR §8204 subd. 2	
COSTS	$ 300.00
DISBURSEMENTS	4,078.26
TOTAL	4,378.26

DISBURSEMENTS

Fee for index number CPLR §8018(a)	$ 25.00
Referee's fee CPLR §8301(a)1	
Commissioner's compensation CPLR §8301(a)2	
Clerk's fee, filing notice of pend. or attach. CPLR §8018(e) §8021(a)12	
Clerk's fee cancel, notice of pend. CPLR §8021(a)12	
Entering and docketing judgment CPLR §8301(a)7 §8016(a)2	
Paid for searches CPLR §8301(a)10	
Affidavits & acknowledgments CPLR §8009	
Serving copy summons & complaint CPLR §8011(c)1 §8301(d)	16.00
Note of issue CPLR §8020(a)	70.00
Paid referee's report CPLR §8301(a)12	
Certified copies of papers CPLR §8301(a)4	
Satisfaction piece CPLR §5020(a) §8021	
Transcripts and filing CPLR §8021	
Certified copy of judgment CPLR §8021	
Postage CPLR §8301(a)12	28.90
Jury fee CPLR §8020(c)1	50.00
Stenographers' fees CPLR §8002 §8301	689.00
Sheriff's fees on execution CPLR §8011(b) §8012	
Sheriff's fees, attachment, arrest, etc. CPLR §8011(a)(c)2, 3(g)	
Paid printing cases CPLR §8301(a)6	
Paid printing case CPLR §8301(a)6	
Clerk's fees Court of Appeals CPLR §8301(a)12	
Paid copies of papers CPLR §8016(a)4	
Motion expenses CPLR §8301(b)	
Fees for publication CPLR §8301(b)	
Serving subpoena CPLR §8011(c)1 §8301(d)	
Paid for Register's Search CPLR §8301(a)10	

Paid for County Clerk's Search	
Paid for Loan Commissioner's Search	
Paid for U.S. District Court Search.....	
Paid for U.S. Circuit Court Search	
Paid for Tax Search.....	
Paid for Referee's Report	
Attendance of Witnesses: CPLR §8001(a)(b)(c) §8301(a)1.....	
Richard Berger.....	500.00
Dr. Dong Sun Chu.....	1,000.00
Paul G. Garland.....	1,537.11
Dr. Elias Savitsky	150.00
Witness Subpoenas	12.00
	4,078.26

APPENDIX K

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 4

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S.M. PIRES AND
VIRGINIA PIRES, his wife,

Plaintiffs-Respondents,

Index No.:
23829/76

- against -

FROTA OCEANICA BRASILEIRA S.A.,

Defendant-Appellant,

EDUARDO LOPEZ as Executor for the Estate of FERNANDO FROTA, OMNIUM OMNIUM TRANSPORTATION CO. (Liberian Corp.), OMNIUM AGENCIES INC., J. DIXON BYRNE as Executor for the Estate of JAMES BYRNE, GALVESTON WHARVES d/b/a PORT OF GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES and CITY OF GALVESTON d/b/a PORT OF GALVESTON

Defendants.

NOTICE OF INTENTION TO APPEAL TO THE SUPREME COURT OF THE UNITED STATES

----------x

PLEASE TAKE NOTICE that, in the event that it is ruled by a court of competent jurisdiction that the order of the Appellate Division, First Department, made and entered on May 1, 1990, modifying and affirming a judgment of the Supreme Court, New York County against Frota Oceanica Brasileira, S.A. ("FROTA") herein, entered in the office of the

County Clerk on October 21, 1988 in the amount of $1,323,666.70, plus interest, is a final order giving rise to a judgment presently enforceable against FROTA,

Defendant FROTA HEREBY GIVES NOTICE of intention to appeal to the United States Supreme Court and/or alternatively to petition for writ of certiorari in accordance and compliance with the Rules of the United States Supreme Court, from each and every one of the following: (1) an order of the Court of Appeals of the State of New York entered on January 15, 1991, declining to reconsider (2) the prior order of that Court entered on November 27, 1990, which declined to review (3) the aforementioned order of the Appellate Division First Department made and entered on May 1, 1990, from each and every part of which FROTA will also appeal, modifying and affirming (4) the aforementioned judgment of the Supreme Court, New York county, entered in the office of the County Clerk on October 21, 1988, against FROTA, in the amount of $1,323,666.70 plus interest.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR 5519 (a) and (c), that the undertaking on appeal previously filed by FROTA herein remains in effect and, therefore, the automatic stay against enforcement of the judgment herein is continued.

Dated: New York, New York
January 18, 1991

Respectfully submitted,

NOURSE & BOWLES
Attorneys for FROTA OCEANICA
BRASILEIRA, S.A.

By: /s/ _____
Shaun F. Carroll (SC9898)
One Exchange Plaza/55 Broadway
New York, New York 10006
(212) 952-6200

TO: Kenneth Heller, Esq.
Attorneys for Plaintiff-Respondents
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Attorney for Defendants
Galveston Wharves d/b/a Port of
Galveston, Board Of Trustees Of
Galveston Wharves and City of
Galveston d/b/a Port of Galveston
Ahmuty, Demers & McManus
55 John Street - 16th Fl.
New York, New York 10038

APPENDIX L

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PART 4

PRESENT:
Hon. Edward J. Greenfield
Justice.

S.M. PIRES, et al

- against -

FROTA OCEANICA BRASILEIRA, S.A.

INDEX NUMBER 23829/76

MOTION DATE 2-5-91

MOTION SEQ. NO. 014

TRIAL CAL. NO. 22

The following papers numbered 1 to _____ read on this motion to _____

Notice of Motion/Order to Show Cause - Affidavits - Exhibits, papers numbered _____.

Answering Affidavits - Exhibits, papers numbered _____.

Replying Affidavits, papers numbered _____.

Upon the foregoing papers it is ordered that Plaintiff's motion for a turn over is granted and defendants' cross-motion for a stay pending appeal by defendant Frota Oceanica Brasileira is denied pursuant to decision and order entered on the record.

Dated February 6, 1991 /s/ Edward J. Greenfield
J.S.C.

APPENDIX M

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 4

----------X

S. M. PIRES and VIRGINIA PIRES,

Plaintiffs

-against- Index No. 23829/76

FROTA OCEANICA BRASILEIRA, et al.,

Defendants

----------X

60 Centre Street
New York, New York
February 5, 1991

Before:

HONORABLE EDWARD J. GREENFIELD,

Justice

Appearances:

KENNETH HELLER, Esq.
Attorney for Plaintiffs

NOURSE & BOWLES
Attorneys for Frota Oceanica Brasileira
BY: THOMAS E. STILES, Esq.
SHAUN F. CARROLL, Esq.

Jesse Mandel
Official Court Reporter

Proceedings

(Excerpt of proceedings)

THE COURT: All right. On this application the Court is of the opinion that there is no basis for any automatic stay under CPLR 5519.

With respect to this aspect of the case, the appellate process has been exhausted. The case has gone to the Appellate Division. The Court of Appeals has refused to hear it.

This aspect of the case on maintenance and cure was severed by the Court, and at the suggestion of defendant's counsel. The issues of maintenance and cure and of consequential damages were further severed, so that in effect we had a tripartite trial set up.

The Appellate Division has in effect dismissed the Jones Act and seaworthiness claims in this case.

So all that remains in this case is a motion with respect to the verdict on consequential damages and the plaintiff's claim against a different party defendant, the railroad.

There being, in the Court's opinion, no automatic stay under 5519, the question then is whether this Court should exercise its discretion and grant a discretionary stay.

In view of the fact that this case has continued for 15 years, that maintenance and cure is supposed to supply a quick and expedient remedy to the injured seaman, in view of the fact that a jury has determined that the defendant willfully and maliciously withheld payment of that maintenance and cure for as long as possible and imposed a punitive damage verdict as a result, this Court is of the opinion that the policy requirements calling for quick, simple and immediate payment on

maintenance and cure, irrespective of fault, when balanced against the defendant's concerns that possibly sometime in the future the United States Supreme Court might do something else with this case, it seems to me it's too remote. The two do not stay in balance.

This Court and an appellate court have reviewed the facts and law carefully and have determined that the plaintiff is entitled to these sums. They have been withheld for a long time. And while one interim payment has been made, the bulk of the payment has not yet been made. And in terms of what has been paid and comparing that to the number of years it is to cover, it is not a munificent sum.

Under those circumstances, the Court will exercise its discretion and deny the application for the stay.

The recourse that defendant has is, of course, to make application for the stay directly to a member of the United States Supreme Court.

Plaintiff may proceed to execute the judgement previously entered, but I will stay the execution of that judgement for three years, to give the defendant the opportunity to make application for the stay.

That is the decision and order of the Court.

APPENDIX N

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER, CLERK OF THE COURT — February 19, 1991 — AREA CODE 202 479-3011

Mr. Thomas E. Stiles
Nourse & Bowles
One Exchange Plaza
At 55 Broadway
New York, NY 10006

RE: Frota Oceanica Brasileira S.A.
v. S.M. Pires, et ux.
No. A-605

Dear Mr. Stiles:

The Court today entered the following order in the above-entitled case:

> "The application for a supersedeas bond or stay of execution of judgment of Supreme Court of New York, County of New York, presented to Justice Marshall and by him referred to the Court is denied."

Very truly yours,

WILLIAM K. SUTER, Clerk

By

Francis J. Lorson
Chief Deputy Clerk

em
cc: Kenneth Heller
Thomas McMahon

APPENDIX O

LIST OF PARENTS AND DIRECT AND INDIRECT SUBSIDIARIES

Frota Amazonica, S.A.

Cirne, Cia Industrial Do Rio Grande Do Norte

Salmac; Comercio; Industria, Exportacao E Importacao S/A

Afrofrota Taxi Aereo Limitada

C.B.A. Cia Brasileira De Aquicultura

S/A Salineira Do Nordeste - Sosal

Fragoso Pires Comercio E Industria S/A

Cia de Participacoes E Empreendimentos Cope

Seguradora Oceanica S.A.

Banco Vega S.A.

Equisul Transportes Ltda.

Tersal - Terminal Salineiro De Aroja Branca S.A.

Codfbra Ltda.

Sabrena, Soc de Reparos Navais Ltda.

Azevedo Bento S.A. Comercio E Industria

Vega S/A Corretora De Valores

Pamar, Participacoes Maritimas

J.C. Pires and Filhos Participacoes, S/A

Supreme Court, U.S.
FILED
MAY 14 1991
OFFICE OF THE CLERK

(2)

No. 90-1582

In The
Supreme Court of the United States
October Term, 1990

FROTA OCEANICA BRASILEIRA, S.A.,

Petitioner,

vs.

STARKHEISER DaSILVA MATOS PIRES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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In The
Supreme Court of the United States
October Term, 1990

FROTA OCEANICA BRASILEIRA, S.A.,
Petitioner,

vs.

STARKHEISER DaSILVA MATOS PIRES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

COUNTER STATEMENT OF FACTS

Pires was employed as a wiper on a "flag of convenience vessel," a bulk carrier which was one of a group of Brazilian, Panamanian and Liberian flag vessels that were being operated in a Unitary bulk cargo service transporting bulk cargo north and south. The ship was owned and controlled by a group of companies including Frota Oceanica, Omnium Transportation (Liberian), Omnium Agencies (New York) all in competition with US flag bulk cargo carrier vessels (Petition for Certiorari A2). He was injured ashore on December 15, 1975 in Galveston, Texas.

The lower trial court ordered an immediate trial on all issues of Maintenance and Cure (Petition, A6-7). The shipowner demanded a jury trial by letter dated May 29, 1987. The immediacy of the maintenance and cure trial was predicated upon the shipowner's abandonment of seaman Pires after 10 months payment of maintenance and a subsequent refusal to continue supporting him while he was fitted and treated for a modern prosthesis in New York at Rusk Institute. The

shipowner's willful, callous and arbitrary act over a 15 year period, relegated seaman Pires to seek his survival, by means of street begging. Simultaneously, he existed by surreptitiously pilfering discarded food from supermarket garbage and other similar sources.

Respondent and his family are residents of New York (Petition A11, 12), and so was the majority owner of the company (EBT, Fernando Frota, March 2, 1988, pp. 38-42). Fernando Frota, now deceased, formerly held controlling common stock interest which is now held by Jose Carlos Fragos Pires who also maintains a permanent residence in New York City (East 63rd Street) (EBT, Jose Calos Fragoso Pires, September 29, 1987, pp. 33-34).

Respondent served his original summons and complaint dated November 17, 1976, on December 2 and 3, 1976.

Respondent moved for partial summary judgment for maintenance and cure.

The Trial Court denied respondent's motion by order dated October 3, 1977 (Respondent's Appendix, Exhibit 1).

This order is improperly identified in petitioner's appendix at Appendix D, p. A-23, as being dated October 20, 1987, ten years later.

This order is improperly identified in the text of the Petition at page 5, last paragraph.

This order was superceded by the August 19, 1986 order of the Supreme Court, affirmed by May 14, 1987 order of the Appellate Division, and the May 26, 1987 Supreme Court order, affirmed as to maintenance and cure by the May 1, 1990 order of the Appellate Division, First Department.

An amended summons and complaint were served on petitioner on October 13, 1980, adding a cause of action for maintenance and cure.

Respondent filed a Note of Issue and Statement of Readiness on May 6, 1986 (Respondent's Appendix, Exhibit 2).

Petitioner's motion to strike the Note of Issue was denied by the Trial Court's memorandum decision and order dated August 19, 1986 (Respondent's Appendix Exhibit 3).

This Order specifically held that the complaint stated a cause of action for maintenance and cure.

Petitioner subsequently entered an order on the Trial Court's decision, on October 10, 1986.

This order was affirmed by the May 14, 1987 order of the Appellate Division, First Department (Respondent's Appendix, Exhibit 4).

Petitioner moved for summary judgment against respondent a second time.

The Trial Court's May 26, 1987 order (Respondent's Appendix Exhibit 5) denied petitioner's motion.

The Trial Court recited its earlier order, entered October 10, 1986, denying petitioner's motion to strike the Note of Issue and again recognized that the complaint stated a cause of action for maintenance and cure.

The Appellate Division, First Department's May 1, 1990 order reversed this order in part (Petition A1-5).

During the maintenance and cure trial, the Trial Court at petitioner's request severed the action for maintenance and cure from its consequential damage action.

The trial justice at the end of the trial of this cause of action, tried from June 22 to July 3, 1987, complied with petitioner's request in accordance with *Gaspard v. Taylor Diving & Salvage Co.*, 649 F.2d 372 (5 Cir. 1981) cert. den. 455 U.S. 907 (1982), and submitted a series of interrogatories to the jury. The eighth specifically asked the jury to determine the threshold question of punitive damages, to which they responded in the affirmative.

> "8. Did the shipowner willfully, callously, or arbitrarily withhold maintenance and cure from the plaintiff?"
>
> A. Yes" [Petition, A-9]

The lower appellate court found Jones Act jurisdiction herein (Petition A2), but dismissed, because it adhered to the Second Circuit decision of *Wheeler v. West India SS Co.*, 103 F.Supp. 631, aff'd 205 F.2d 354, cert. den. 346 U.S. 339 (Petition A3), which conflicts with all the other Circuits of the United States except the Ninth Circuit which is split between two different benches.

All of the other Federal Circuits apply a different standard than the Second Circuit in ruling as to whether a Jones Act

seaman is entitled to bring an action for injuries sustained off the vessel, but these issues are not before this Court at this time.

New York has the major interest in this action, not the United States, because it is interested in preventing shipowners from abandoning their disabled employees to our state welfare system.

THIS COURT SHOULD DECLINE TO ACCEPT THE PETITION FOR CERTIORARI

POINT I

A. THERE ARE NO CONSTITUTIONAL OR STATUTORY ISSUES INVOLVED IN THE PETITION

Petitioner alleges three constitutional and statutory provisions are involved in their Petition:

1. U.S. Constitution, Article III, Section 2 Clause 1, giving the U.S. Supreme Court authority to review all cases of admiralty and maritime jurisdiction;

2. 28 USC 1333, the Savings to Suitors Clause, permitting respondent to commence his action in the state court, rather than the federal court; and

3. Jones Act, 46 USC 688 permitting a seaman who suffers personal injury the right to sue for money damages with right to trial by jury.

None of these constitutional and statutory provisions are at issue in this case.

While this Supreme Court has jurisdiction to review maritime cases, such as this one pursuant to Article III, Section 2, Clause 1, it should decline jurisdiction here for the reasons set forth in the points, *infra*. This constitutional provision is otherwise not in issue, and not invoked elsewhere in the Petition.

There is no issue in this case nor in the Petition, involving the Savings to Suitors Clause. Respondent's lawsuit, including his maintenance and cure action, has been pending for sixteen years in the New York State Supreme Court. Seaman Pires selected the state court as his forum, pursuant to the Savings to Suitors Clause. Petitioner mentions the Savings to Suitors Clause on p. 17 of his petition, to stand for the proposition that

state courts must follow the uniform federal maritime law. While the latter is true, it is a *non sequitur.*

There is no issue in this maintenance and cure case nor in the Petition involving the Jones Act. The May 1, 1990 Appellate Division, First Department order (Petition, A1-5) dismissed respondent's Jones Act action. The Jones Act action is separate and apart from the maintenance and cure cause of action.

Petitioner's statements on p. 13 of his Petition that punitive damages are not recoverable under the Jones Act is irrelevant and immaterial to the maintenance and cure issues in this case which are founded in General Maritime Law.

Petitioner's subsequent statement on p. 13 that the respondent's "claim for consequential damages for failure to provide maintenance and cure is covered by the Jones Act" misstates the law. See *Vaughan v. Atkinson,* 369 U.S. 527 (1962). Petitioner's claim for consequential damages for failure to pay maintenance and cure is part of the damages recoverable for petitioner's willful, callous, and arbitrary refusal to pay maintenance and cure, and does not require Jones Act status as a predicate finding.

As there are no Constitutional or statutory issues involved in the Petition, the Court should decline jurisdiction and dismiss the Petition.

POINT II

PETITIONER'S PETITION IS PREMATURE AND SHOULD NOT BE CONSIDERED BY THIS COURT

Respondent's cause of action for maintenance and cure, which includes the elements of maintenance, care, cure, punitive and consequential damages, including loss of consortium and attorney's fees, was severed at the request of petitioner during the first trial.

Petitioner thereby successfully split one cause of action—"maintenance and cure"—into three causes of action and trials conducted over a period of three years:

1. maintenance and cure;
(June 17-July 2, 1987)

2. punitive and consequential damages
(December 12, 1988-January 27, 1989)

3. attorney's fees
(August 28, 1989)

Petitioner's motion to set aside the jury verdict at the second trial was submitted to the Trial Court on June 13, 1989 and is *sub judice.*

The Trial Court has not issued any decision following the third which was without a jury.

This Supreme Court cannot properly consider any issues raised and arguments made in the Petition at this time due to the pendency of these related proceedings which are integral components of respondent's "maintenance and cure" cause of action.

This Supreme Court should not permit petitioner to split respondent's one cause of action for maintenance and cure, to obtain three separate United States Supreme Court reviews of the same issues of fact and law.

Petitioner's petition is premature and must be denied.

POINT III

THE NEW YORK COURT OF APPEALS ORDER IS NOT A FINAL JUDGMENT, IT DOES NOT FALL WITHIN THE COX BROADCASTING CO. V. COHN EXCEPTIONS, AND IS NOT REVIEWABLE

Petitioner seeks review of two May 1, 1990 Appellate Division, First Department orders (Petition A1-5 and A29-30) alleging they are reviewable under 28 USC Sec. 1257(3) (1961).

28 USC Sec. 1257(a) permits this Supreme Court to review *final* judgments or decrees rendered by the *highest* court of any state.

The Appellate Division, First Department is an intermediate appellate state court.

The two orders dated May 1, 1990 are not final judgments or decrees. See Point II *supra,* and the three subsequent orders:

1. July 26, 1990 Order, Appellate Division, First Department, denying petitioner leave to appeal to the Court of Appeals (Petition, A26);

2. November 27, 1990 Order, New York Court of Appeals, dismissing petitioner's motion for leave to appeal, because it is not a final order (Petition, A25); and

3. January 15, 1991 Order, New York Court of Appeals, denying petitioner's motion to reargue the November 27, 1990 order (Petition, A-24).

Petitioner's Appeal from one other order is being used as a means to collaterally attack the May 1, 1990 orders, and is pending at this time:

4. February 6, 1991 Order, Supreme Court, New York County, denying stay of execution of judgment (Petition A45-48), being separately appealed by Petitioner (Respondent's Appendix, Exhibit 6)

5. March 7, 1991 Order, Appellate Division, First Department, denying Petitioner's motion to stay execution (Respondent's Appendix Exhibit 7)

Petitioner has failed to satisfy the statutory requirements of 28 USC 1257(a) of "highest court" and "finality."

The two orders do not fall within any judicial exceptions to the finality rules set forth in the case of *Cox Broadcasting Co. v. Cohn,* 420 U.S. 469 (1975) at p. 447 *et seq.*

1. There are no constitutional or federal statutory questions involved. See Point I *supra.*

2. There are no important "federal questions" under the Uniform General Maritime Law raised by petitioner.

a. Petitioner's Point I

Juries have long awarded lump sums of money for future maintenance and cure for destitute seamen. See Point V, *infra.*

The *Pires* jury awarded future maintenance and cure for a defined, limited period of time based upon medical testimony of Pires' treating doctor from Rusk Institute, New York University Medical School, and petitioner's doctors, Evans and Balensweig.

The "Large size" of the lump sum award was determined by the jury as an issue of fact based upon evidence and testimony at trial. "Large size" awards are not a federal question.

b. Petitioner's Point II

This Court has expressly permitted, allowed and authorized awards for punitive damages for willful failure to pay maintenance and cure. Petitioner correctly cites the case on point, *Vaughan v. Atkinson,* at p. 11.

Any alleged conflict among Circuits or between New York State and the Second Circuit is an issue not ripe for review until a decision is entered on the second trial for punitive damages, and all appeals are exhausted.

This Court's most recent decision of *Pacific Mutual Life Insurance Co. v. Haslip,* 59 LW 4157 (No. 89-1279), March 4, 1991, expressly authorizes awards of punitive damages and resolves any "conflict" created by *Miles v. Apex Marine Corp.,* __U.S.__, 111 S.Ct. 317 (1990).

3. Petitioner gladly paid part of the judgment to adjourn the second trial, during trial proceedings (Respondent's Appendix, Exhibit 8). Petitioner paid the balance of the judgment after a panoply of post-trial motions and appeals (Respondent's Appendix Exhibit 9). The issues raised in the petition, including "Large lump sum award" are moot.

4. No federal issues are involved herein because this is a dispute between a Brazilian seaman, now a resident of New York City, and a "flag of convenience shipowner," a New York City resident until his demise. The law involved was Brazilian Commercial Code Article 560 and International General Maritime Law. Article 560 was recognized by this Court in the *Osceola* 189 U.S. 158 (1903) as the Brazilian version of maintenance and cure. All the issues of fact as to whether Article 560 was still vital and applicable was part of the Trial Court charge and an issue of fact which went to the jury at petitioner's request. The other issues are issues of fact which are set down in the jury interrogatories and their responses, based upon uncontradicted medical testimony. This Court should decline jurisdiction because the controversy is between two citizens of another country, though they both are residents of New York City.

POINT IV

PETITIONER IS ESTOPPED HEREIN FROM SEEKING THE REVIEW OF THE LOWER COURT'S APPLICATION OF BRAZILIAN STATUTES AND LAWS ON MAINTENANCE AND CURE. THIS WAS THE ESSENCE OF THE LOWER COURT TRIAL AND APPEAL

Petitioner seeks jurisdiction of this Court which may be invoked if any federal question of importance is involved. The issues urged by both sides below were the application and identity of Brazilian Statutes which govern and control Brazilian Maintenance and Cure. Essentially this is a disagreement which does not touch upon or affect any issues of national importance.

There was nothing in the above controversy which is of sufficient importance to invoke the jurisdiction of this Court, on the basis of the issues in this present controversy.

The Petition fails to include, identify and explain the appropriate Brazilian statute relied upon by the Trial Court along with the issue involved with that statute, because if he did so this would support respondent's position that there are no issues or matters of federal importance sufficient to invoke this Court's jurisdiction.

Petitioner's failure to include, identify and explain the application and impact of the Brazilian statute constitutes a waiver and estoppel of any claim based on this statute.

Petitioner's failure to include any Brazilian statutes governing maintenance and cure, which they urged at trial (Petition, A9-13) or on appeal (Petition, A4-5; A29-30) constitutes a waiver of their right to seek review in this Court of the Trial Court and appellate court rulings that United States and Brazilian laws governing maintenance and cure are identical (Petition, A4-5).

POINT V

THE LUMP SUM PAYMENT FOR FUTURE MAINTENANCE AND CURE IS BASED ON ARTICLE 560 OF THE BRAZILIAN COMMERCIAL CODE AND WAS AN ISSUE OF FACT DETERMINED BY THE JURY

This decision involves a Brazilian maintenance and cure statute Article 560 of the Brazilian Commercial Code. The *Osceola,* 189 U.S. 158 (1903) determined that this code is similar to our maintenance and cure. The jury factual determination was based upon medical evidence of a defined future need (Petition, A14-15).

None of the above issues touch upon anyone or anything in the United States or are of interest to this Court.

The statute involved was Brazilian, which a jury determined had been violated. The other factual issue, which involved a basis for a future maintenance and cure award were based on the unchallenged medical testimony of all the medical experts.

The defined future period was based on unchallenged medical testimony that seaman Pires requires a new model prostheses each one to two years along with additional medical treatment and care to improve his medical and physical condition so that he is better able to walk and function.

The Trial Court instructed the jury on these issues as follows (R 1640-41 [R refers to Trial Record on Appeal]:

> You have heard that term "bandied about." Maximum cure. It means that point at which no further improvement in the seamen's medical condition can he expect; when he will benefit from any further medical attention. At that point he reaches maximum cure.
>
> ***
>
> (R 1641-42)
>
> So, after all of the medical attention and the operation and the after care has been completed, that seaman reaches the point of maximum cure. Look at him and say, well, sorry, but there is nothing further that medicine can do for you. That's maximum cure.

So, the obligation, to continue providing for medical attention, and when qualified, medical opinion as to the effect that maximum cure has been effected. And that's one of the things that you will have to decide: was maximum cure effected when this plaintiff left the hospital in Galveston on February 28th, 1976, was he at a point where nothing further, no further medical attention would benefit his condition. If not, did there come a later date at which he reached that point, or has he not reached that point now. And will he continue to require further medical attention with respect to his condition as it changes for the rest of his life.

***

(R 1642-1643)

. . . You have a different case here. You're going to have to decide was maximum cure affected at some point in the past or is there more yet to be done.

You have to take into account what the medical testimony is. Dr. Chu has testified that the plaintiff has not reached the point of maximum cure; that maximum cure would require that this plaintiff be able to walk without support and without dragging his foot, and that would take prolonged training, and that during this period he would need changes of prosthesis because the stump changes with use, with age, with weight-bearing, and various other circumstances. So he says, point of maximum cure has not been reached up to now and will continue on into the future.

Dr. Savitsky, psychiatrist, has testified that this plaintiff . . . that further psychiatric counseling would be needed to help to restore him in that he has not reached the point of equilibrium where nothing further could be done for him.

***

(R 1644-1645)

Dr. Burke Evans, who was the treating surgeon who performed the amputation in Galveston, testified that

there were further things that had to be done . . . that the plaintiff would need a new prosthetic device every 18 to 24 months, and that in his opinion, even in 1983, he needed further gait training.

So, you have to examine the medical opinions which have been proffered to you and make a determination as to when, if at all, a point of maximum cure has been reached.

Obviously all of the issues of an award for future maintenance and cure were predicated on Brazilian Article 560 of its Commercial Code, and the issues of fact based upon the medical testimony as to the extent of future curative rehabilitative need.

All of the existing authorities carefully explain that a disabled seaman's future medical and subsistence needs are wholly predicated on the medical testimony. *Holmes v. J. Ray McDermott,* 734 F.2d 1110, 1985 AMC 2024, page 2031, explains:

The standard for determining when maximum cure has been achieved, which demarcates the point at which an employer properly may terminate a seaman's maintenance and cure, has been stated by this court as follows:

"The accepted legal standard holds that maximum cure is achieved when it appears probable that further treatment will result in no betterment of the seaman's condition.

To the identical effect is the Fifth Circuit decision *Pelotto v. L & N Towning Co.,* 604 F.2d 396, 1981 AMC 1047, which follows a prior line of authorities:

Cure involves the payment of therapeutic, medical, and hospital expenses not otherwise furnished to the seaman, again, until the point of "maximum cure." *Farrell v. United States* (1949), 336 U.S. 511, 1949 AMC 613; *Myles v. Quinn Menhaden Fisheries, Inc.* (5 Cir., 1962).

. . . The accepted legal standard holds that maximum cure is achieved when it appears probable that further treatment will result in no betterment of the seaman's condition. *Far-*

rell v. United States, supra; Brown v. Aggie & Millie, Inc. (5 Cir., 1973), 1973 AMC 2645, 485 F.2d 1293.

Also identical is *Lirette v. K & B. Boat Rentals,* 579 F.2d 968, 1980 AMC 1055, in which the appellate court awarded Maintenance and Cure until plaintiff seaman reached "maximum benefits of medical treatment." This doctrine is imposed when an award is supported by a physician's testimony. Courts have granted future maintenance, including psychiatric treatment, *under a panoply of different conditions.*

> . . . Courts since Calmar have treated this principle largely as a matter of proof. For example, the Supreme Court reversed an order to pay future maintenance for three years when the plaintiff introduced no evidence to justify maintenance for that period. Salem v. U.S. Lines Co., 370 U.S. 31, 1962 AMC 1456 (1962). When the award is supported by physician's testimony, however, courts have granted future maintenance, including: psychiatric treatments, Domeracki v. Gulf Oil Corp., 1965 AMC 1469, 342 F.2d 219 (3 Cir. 1965); maintenance for three months after trial, Keiser v. American President Lines, Inc., 1975 AMC 371, 384 F.Supp. 554 (SDNY 1974); $1,000 for an operation and $8 per day for twelve weeks to recover, Louviere v. Fidelity & Casualty Co., 210 F.Supp. 260 (WD La. 1962). The principle that the employer's duty goes no further than the seaman's need does not prohibit the district court's order in this case. Under this order, once the plaintiff has reached maximum possible cure," the defendant has no further duty to pay him.

The duration of curative maintenance and cure, its synonym, "maximum benefits of medical treatment," can only be determined by the individual and medical treatment needs of each seaman. Each case is unique. This determination can be only a question of fact based upon the medical testimony adduced at the trial.

The jury's award was based on its finding of future maintenance and cure that "maximum benefits of medical treatment" were still to be achieved, over a defined future period (Petition, A-9, A-15, A-16; A-19).

Supportive medical testimony is critical to a jury verdict for maintenance and cure, because only the jury decides the duration of a seaman's maximum benefits of medical treatment. *Vella v. Ford Motor Co.*, 421 U.S. 1, 1975 AMC 563, *Calmar Steamship Corp. Taylor,* 303 U.S. 501 (1938), *Billiot v. Toups Marine,* 465 F.Supp. 1265, 1979 AMC 1966, *Lirette v. K & B Boat Rentals, Inc.*, 579 F.2d 968, 1980 AMC 1055, *Harper v. Zapata Offshore,* 563 F.Supp. 576 (ED La. 1983), *Gaspard v. Taylor Diving, supra, Murphy v. Light,* 257 F.2d 323.

The ultimate determination, the final total damage award must be supported by a medical threshold upon which to determine the future cut-off date, or duration of maintenance and cure.

Pires' factual pattern is unique; there was overwhelming medical testimony which supported a determination of the two disputed issues of fact in Pires' favor, the term and the amount (R 2025; 1994-95; 2001-07).

A translation of the maintenance and cure requirement of maximum benefits is as long as medical science is capable of improving seaman Pires' condition, maximum benefits of medical treatment have not been reached. All of the doctors agreed that such was the case here.

The trial court (R 2002) properly charged the recognized standard of maximum cure, or its synonym "maximum benefits of medical treatment" to the jury.

Petitioner has sought to compel Pires to return persistently and expend a trial court and jury's time in "serial suits" to collect maintenance and cure for the next succeeding 33 years. Petitioner insists that the serial suits be successively brought following seaman Pires' enduring a 15-year period of starvation and medical neglect. Neither seaman Pires nor the State Court Trial System need to be burdened with that repetitive litigation.

In *Charles Brown v. Dravo Corp.*, 157 F.Supp. 265 affirmed on appeal, 258 F.2d 29, a district court judge presiding at a maintenance and cure case without a jury, rendered a judgment awarding maintenance and cure for a term of nine elapsed years and for an indefinite period into the "foreseeable future." His decision, affirmed by the Court of Appeals, directed that lump sum future maintenance be paid to provide for future treatment, when it said:

> In connection therewith, I advert to that rule of law wherein the court is empowered to award such reasonable sums as the circumstances of the case indicate to cover future treatment for a foreseeable future period of time.

The Third Circuit Court of Appeals, affirming the granting of maintenance and cure for a nine-year period, found such an award to be appropriate and also found that a lump sum for future maintenance and cure issues into the "foreseeable future" is accepted practice in maintenance and cure issues. The Circuit Court recognized that even if the foreseeable future period cannot be measured with exactitude, along with the impossibility of guaranteeing the seaman's future existence, nevertheless it supported the lower court's decision.

> . . . The answer to these arguments is that the district court found that respondent was sufficiently apprised of libellant's condition when the suits were filed on March 15, 1948 and that the pending proceedings constituted notice of libellant's continuing need for maintenance and cure.
>
> ***
>
> . . . Farrell vs. United States, 336 U.S. 511, 518, 1949 A.M.C. 613. The duty to provide maintenance and cure thus continues until the time when the maximum cure possible has been effected, and the district court did not award the libellant more than this. We, therefore, find no error in its judgment in this regard.

The duration of maintenance and cure, all authorities agree is a factual determination founded upon medical testimony. Future awards for maintenance and cure are determined by whether the medical testimony supports a claim that further improvements in the seaman's condition can be had by additional treatment. If so, then the seaman has not reached maximum benefits of medical treatment.

In *Edwards v. Statton & Statton Co.*, 215 So.2d 387, a seaman's return to work was insufficient to terminate his right to maintenance and cure because there was medical proof that medical treatment could improve his condition. The court recognized this factor when it said, return to work:

"does not terminate his right to maintenance and cure in whose service he became injured or ill. Permanente S.S. Corp. vs. Martinez, 369 F.2d 297.

. . . and the fact that the plaintiff (Seaman) returned to his regular employment does not bar his recovery (Citations omitted). Plaintiff is entitled to maintenance and cure undiminished by the amount of his earnings on the jobs between certifiction as Fit for Duty by the U.S.P.H.S. and the date of the jury verdict, Vaughan vs. Atkinson, supra. See Pyles v. American T & P. Corp., 372 F.2d 611.

Maintenance is to be paid as long as there are reasonable prospects of substantial cure. *Monroe v. Farrell Lines,* 1965 A.M.C. 2703, the trial court noted at p. 2706:

. . . I am of opinion that maintenance is required as long as there is a reasonable prospect of substantial cure.

Future maintenance depends on the medical condition of the seaman and the impact of modern medicine and rehabilitation. Maritime courts recognize that the maritime doctrine of maintenance and cure which can continue as long as the:

. . . application of modern "methods of rehabilitation under medical supervision, the seaman is returned, as near as may be, to the status of a functional human being." (Citations omitted). See Smith v. Dale Hart, Inc., __F.Supp.__, 1969 AMC 2400 (W.D.La. 1968).

The above trial court recognized the impact of modern medicine and rehabilitation when they discussed the effect of modern medicine on the seaman's orthopedic injuries.

In *Sobosle v. U.S. Steel Corp.*, 359 F.2d 7, the Third Circuit Court of Appeals was confronted by a need to apply the modern medical discipline of psychiatry and its constant qualitative improvements to a seaman suffering for the past 20 years from a mental illness contracted while in the "service of the ship."

Judge Abraham Freedman, writing for the bench, recognized that a shipowner relationship with a seaman is a unique one because he stands in:

> "loco parentis" to him, and that the courts are obligated to recognize "that the conduct of the seaman is viewed with a solicitude much different from the objectivity which prevails in judging transactions between strangers.

and that new medical treatment constantly applied determines the term for future maintenance and cure.

> . . . Because of admiralty's ancient interest in the rights of the seamen who are its wards a shipowner's obligation to supply maintenance and cure may be revived by the subsequent appearance of new means of treatment after it has been discharged by the apparent achievement of maximum cure.

The Third Circuit Court of Appeals adopted the standard, that maintenance and cure should be provided as long as medical testimony supported the position, that the application of medical science might benefit or improve the seaman's condition.

Circuit Judge Freedman's adoption of the district court's holding in *Sobosle v. U.S. Steel* explains how the constant improvements in medical science impact the duration of maximum benefits of medical treatment, because future maintenance and cure is contingent upon the application of modern medical scientific treatment which:

> can provide medical treatment that might or could benefit or improve the condition or ailment now experienced and suffered by the seaman.

The Federal Court of Appeals explained what maximum benefits means in terms of modern medical technological changes:

> . . . It is my conclusion that the functional nervous condition now experienced by the seaman has continued since the date of the adjudication of Judge Clary and has become progressively worse. In addition thereto, I am satisfied that there is treatment known to medical science that might or could benefit or improve the condition and ailment now experienced and suffered by the seaman.

[2] The law is settled that the ship owner is required to furnish medical care and maintenance, including board and lodging, until the disabled person has been cured or the disability has been declared permanent, or until such time when the maximum cure possible has been effected. Farrell v. United States, 336 U.S. 511, 69 S.Ct. 707, 93 L.Ed. 850.

Until such time as the seaman has been afforded such treatment that the medical profession can state that the maximum cure possible has been effected, maintenance and cure must be paid by the shipowner . . . I make this recommendation for the reason that maintenance and cure must continue until every approach reasonably known to medical science is applied in an effort to cure the seaman and if the suggestion is followed, the parties and the court will within a reasonable length of time in the future be able to know the answer to this most unfortunate situation. (Emphasis added).

Esteemed jurist J. Skelly Wright, now in the Court of Appeals for the District of Columbia, presided over a maintenance case *Scott v. Lykes Bros. S.S. Co.*, 152 F.Supp. 104 (ED La. 1957), 1957 A.M.C. 1340. This involved the application of modern medicine as a basis to provide maintenance and cure for a severely injured seaman.

Judge Wright in describing the physical condition of the seaman noted that no medical condition can be declared hopeless as long as the changes wrought by modern medical science can continue to provide opportunity to improve the seaman's condition. Therefore, maintenance and cure can continue side by side to provide vital and viable medical assistance to merchant seamen which is curative. Maintenance and cure as an expansive doctrine attaches itself to modern medicine and will justifiably provide assistance into the "foreseeable future."

This case graphically depicts one man's courageous fight for control of his mental and physical faculties after suffering a disabling brain injury which paralyzed his speech process as well as his left arm and leg, already badly

broken in the accident. By determined and continuous application of modern methods of rehabilitation under supervision, this plaintiff seaman has delivered himself from the life of a gibbering, hopeless, helpless cripple to that of a functional human being, able to speak to walk, to work, and even to contain himself after months of being fitted with an artificial evacuation receptacle.

Judge Wright's decision impacts our own jury's factual determination. Judge Wright made his own factual and legal determination that the duration of maintenance and cure is to be extended as long as medical science instructs us that a seaman's condition can be improved by curative medical means:

> . . . This court holds that maximum cure, as defined by the Supreme Court, is not achieved by the administration of pills and poultices alone, that maximum cure is reached, in the circumstances of this case, when, through the application of modern methods of rehabilitation under medical supervision, the seaman is returned, as near as may be, to the status of a functional human being.

POINT VI

ALL OF THE ISSUES OF MAINTENANCE AND CURE BETWEEN PIRES AND THE M/V FROTALESTE INCLUDING MAXIMUM CURE WERE FIXED BY THE MASTER ON DECEMBER 15, 1975

Pires' term for future maintenance and cure was unique because the duration of the future term for maintenance and cure was fixed by his Captain of the M/V FROTALESTE.

On December 15, 1975 the Captain of the M/V FROTALESTE acting on behalf of his employer made an Oral Maritime Contract in Texas which supported and probably superseded the original maritime contract made as part of the ship's articles of agreement.

The captain of the M/V FROTALESTE bound the shipowner (R 288 1. 24-289 1. 4):

> "I can guarantee you the company will give you the best medical care and treatment in the world for as long as you need until you walk like a man, not like a cripple."

See the language of Judge J. Skelly Wright in *Scott v. Lykes Bros., supra*, defining the level of a seaman's condition in terms of maximum cure, *supra.*

When the Captain offered Pires to provide him with all modern rehabilitation and treatment, so Pires could walk like a man and not like a cripple (R 288-289), he defined his employer's obligation in terms of the duration and quality of all Pires' future maintenance and cure. Pires' acceptance constituted a contract.

Pires' action herein to recover past and future medical care and cure, is founded upon this agreement coinciding with the doctrine of maintenance and cure that originated at the time of Pires' engagement on the vessel.

The Captain of the M/V FROTALESTE's offer to seaman Pires was accepted by seaman Pires but breached almost immediately by Frota Oceanica when they refused to monitor the inadequate treatment at John Sealy Hospital, December 11, 1975 - February 27, 1976 and when they refused to pay for the

rehabilitation and prosthetic treatment at from March, 1976 at Rusk Institute.

Pires explained what transpired in his hospital room on December 15, 1975.

Q. Now, what was the next thing that yo remember? Did the captain come to visit you?

A. Yes.

Q. Well, forgetting the company's lawyer, what did the Captain talk to you about?

After all, he is your boss, what did he do for you?

A. He told me that I had to sign some papers and that the company would be giving the best medical care and treatment in the world.

MR. MCMAHON: Objection

THE COURT: Overruled.

The Captain told him the company would give him the best medical care.

Go ahead.

THE WITNESS: For as long as I could need, and I would walk like a man again, not a cripple, and I said thank you very much, and I accept and appreciate, even though I am being abandoned, but I know the company will do the best for me.

MR. DEMAY: Your Honor, may I have the last answer read back, please.

THE COURT: Read that back.

Q. Tell us, Mr. Pires what the Captain said to you?'A. He said he just came from the company's office there in Galveston; that the ship was abandoning me, but he said by the way, I can guarantee you the company will give you the best medical care in the world and treatment for as long as you need until you walk like a man, not like a cripple."

In Kossick v. United Fruit, 365 U.S. 731, 1961 AMC 833, this Court recognized that a similar "Oral Maritime Contract" originated bacause the shipowner offered to guarantee the quality of treatment provided to seaman Kossick, at United States Public Health Service, in lieu of his submission to treatment by his private physician who demanded payment for same.

Seaman Pires and Frota Oceanica were both parties to this Oral Maritime Contract in which Frota agreed to provide seaman Pires with the best medical treatment in the world. This meant Rusk Institute.

Frota Oceanica never denied that they entered into this Oral Maritime Contract nor did they produce any testimony on trial to refute the making of said contract (R 492-94; 1549-1551; 1789-1795).

Pires' consideration was the fact that he was a seaman on board the M/V FROTALESTE.

POINT VII

THIS ENTIRE PETITION IS PREMATURE AND THEREFORE NON-FINAL BECAUSE ALL OF THE ISSUES OF MAINTENANCE AND CURE ARE NOT BEFORE THIS COURT

On February 21, 1989, Frota moved to set aside the punitive damage portion of the jury's verdict on the ground that such damages are not recoverable under *Vaughan v. Atkinson*, 369 U.S. 527 (1962). Frota's post trial motion has gone undecided for almost two years at this point. As a consequence, there is no judgment entered as to the quantum of consequential damages, exemplary punitive damages and attorneys' fees in this case, though all of those claims have been fully tried.

There is no issue pending with regard to attorney's fees because that issue has not been determined by the Trial Court. Page seven of Petitioner's Brief:

> Thereafter, in January 1989, the parties proceeded to trial on the issue of consequential damages which arose from the alleged failure to pay maintenance and cure. This trial resulted in a jury verdict in plaintiff's favor awarding, inter alia, $24,000,000.00 in punitive damages. On February 21, 1989, Frota moved to set aside the punitive

damage portion of the jury's verdict on the ground that such damages are not recoverable under Vaughn. Frota's post trial motion has gone undecided for almost two years at this point. As consequence, there is no judgment entered as to the quantum of consequential damages, exemplary punitive damages and attorneys' fees in this case, though all of those claims have been fully tried.

The consequential damage issues was severed and became the subject of a second trial (December 12, 1988 - January 27, 1989). All of the maintenance and cure issues involved in two trials should be submitted simultaneously in any petition for certiorari. Therefore, the petition's second point is premature, is not presently before this Court, and it may never be before this Court if the trial judge dismisses it. For all of these reasons this entire application is premature, not final and should be denied on jurisdictional grounds.

The Trial Court has not yet determined any basis for submission to this Court of any issues raised in Point II or Question II. Therefore, this entire point is premature.

The issue, if any, of whether there is any conflict between any of the Federal Circuits is not an issue herein. The petitioner is setting up a "straw man" in which there appears to be some excuse to ask this Court to make a determination. Since no issue exists, this point should be stricken.

Miles v. Apex Marine Corp., -U.S.-, 111 S.Ct. 317 (1990) does not impact this case, since *Pires* only involves maintenance and cure awarded under a Brazilian Statute and International Maritime Law of Maintenance and Cure. *Miles* confines itself to the Jones Act which is not in issue in this *petition*.

New York State Courts are not required to follow the Second Circuit in maritime law. The Second Circuit is only one of eleven circuits, and the New York State Supreme Court may choose to follow any of them, which was done in *Alvez v. American Export Lines*, 46 NY 2d 634 (1979), aff'd 446 U.S. 274 (1979). There New York State adhered to the Fifth and Ninth Circuits decision and discarded the Second Circuit case of *Igneri v. Cie. de Transports Oceaniques*, 323 F.2d 257, cert. den. 376 U.S. 949. Therefore, New York Courts only are required to follow the law of this Court.

POINT VIII

A DETERMINATION WHETHER THE SHIPOWNER WAS WILLFUL, ARBITRARY AND CAPRICIOUS IN ABANDONING SEAMAN PIRES WAS AN ISSUE OF FACT DETERMINED BY A JURY BASED ON OVERWHELMING TESTIMONY

Petitioner complains about the submission of the eighth interrogatory to the jury which invited them to make a determination as to whether the action of the shipowner amounted to conduct which was the threshold for the imposition of punitive damages.

Petitioner made the following fatal trial errors:

1. failure to object to submission of the issue of punitive damages to the jury;
2. failure to object to submission of the issue of punitive damages to the jury (R1670-81); and
3. failure to object to the submission and content of jury interrogatory #8 (R 2025).

All maritime courts recognize that the punitive damage process is a two stage process. The first stage is the threshold determination of shipowner's misconduct. The second is the sum of the damages.

Petitioner's intentional confusion impels this response, in the form of two separate points within this brief. Both are needed to clearly explain petitioner's erroneous impressions and to clarify the fact that the court followed the prescribed procedure on the first stage of the punitive damage issue.

Therefore this first point must focus on petitioner's waiver of its right to appeal from Interrogatory 8 and the punitive damage issue herein.

The next succeeding point is engendered by reason of petitioner's misstatements, oversights, and application of erroneous decisional law to the factual issues of this case.

Petitioner demanded that the maintenance and cure issues be bifurcated into two parts, the first part, maintenance and cure, the second, consequential and punitive damages (R 190-191).

The trial court acceded to petitioner's request shortly before the openings to the jury (R 190-191), and the trial court stated that it would submit the threshold issue of punitive damages as a jury interrogatory at the conclusion of the trial (R 181, 190-194). Petitioner agreed to that procedure and failed to make an objection to the subsequent punitive damage practice.

All maritime authorities agree that a failure of trial counsel to timely object or except to a charge is fatal to an appeal from that issue.

Petitioner appeals from the submission of the following Interrogatory to the jury (R 1694):

> "Question No. 8, did the shipowner willfully, callously or arbitrarily withhold maintenance and cure from the plaintiff?
>
> The jury responded - "YES".

Interrogatory Eight was identical to the one extrapolated directly from *Gaspard v. Taylor Diving & Salvage Co., Inc.*, 649 F.2d 372, 374, that was approved by the Fifth Circuit:

> 13. [W]as [Taylor] willful, arbitrary or unreasonable in its failure to pay Paul J. Gaspard maintenance and cure?
> Answer, Yes
>
> 14. If your answer to Question No. 13 is Yes, what amount do you find plaintiff is entitled to recover as damages from his employer because of its failure to pay maintenance and cure?
> Answer, $296,240

Appellate authorities, when reviewing trial rulings in maritime cases, refuse to review any issue not raised before the trial judge. This is based upon the theory that the trial judge is unable to repair an error if said error was not called to his attention by an objection or an exception during trial.

The First Circuit Court of Appeals in *Valm v. Hercules Fish Products*, 701 F.2d 235, a Jones Act case recognized that a failure of trial counsel to request a directed verdict on unseaworthiness is fatal to any appellate review.

Another First Circuit decision similarly holding is *Hubbard v. Faros Fisheries, Inc.*, 626 F.2d 196 (1 Cir. 1980), which refused to review a Breach of Warranty of Seaworthiness issue

because of the failure of trial counsel to move for a directed verdict.

A more recent decision by an appellate court in *Templemen v. Chris Craft*, 770 F.2d 245, refused to review an issue as to whether the maritime law was properly aplied because petitioner failed to raise that issue in a lower court.

The Second Circuit Court of Appeals reviewed an appeal brought by the widow of a ship captain against the shipowner for the death of her husband.

In *Van Nijenoff v. Bantry Transp.*, 792 F.2d 26, 1986 AMC 2312, the plaintiff failed to object to a special jury interrogatory, and to request another interrogatory on apportionment of damages. This was fatal to her appeal:

> We need not resolve this issue (apportionment of fault), however, because petitioner never asked that the jury make the distinctions she now describes as imperative. Apportionment of damages requires separate findings as to the damage caused by each harm--here, the fall and subsequent failure to secure adequate medical attention. However, the special verdict form to which petitioner consented in no way asked the jury to apportion harm. The jury was asked only to determine damages resulting from 'the accident.'
>
> Nor can we allow petitioner to try the case anew on a theory steadfastly avoided until after the verdict.

The *Van Nijenoff* decision is reflective of the appellate attitude towards trial counsel who fail to raise issues timely, by means of an appropriate objection or exception, to call this to the Court's attention.

Petitioner's trial counsel failed to mention in its petition that it is now seeking to resurrect to this Court an entire issue of punitive damages, when it failed to object to the important jury interrogatory, asking the jury to make the threshold determination, nor did it object to the Trial Court's charge (R 1680 1. 12-17). It cannot now resurrect an entire issue that has been permanently interred by reason of its failure to timely object to the jury interrogatory and the Court's charge (R 1666).

Petitioner seeks to transform this Court into another appellate stage to repair its own errors. This issue is not one of national importance nor can it be one ripe for review after petitioner's earlier act of overlooking this issue on trial.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

KENNETH HELLER
Attorney for Respondent
335 Broadway, Suite 614
New York, New York 10013
(212) 962-6085

EXHIBIT 1 ORDER OF GREENFIELD J. OCTOBER 3, 1977

INDIVIDUAL CALENDAR PART 22

New York Supreme Court
County of New York

S.M. PIRES AND VIRGINIA PIRES, HIS WIFE
-against-
FROTA OCEANICA BRASILEIRA ET AL.

Hon. EDWARD J. GREENFIELD

***

Upon the foregoing papers this motion for partial summary judgment on the cause of action for maintenance and cure is denied. The complaint in this action does not contain a cause of action for maintenance and cure, which is a form of compensation given by the General Maritime Law to a Seaman who calls ill or is injured while in the service of a vessel. *Evans v. Glindberg Rothchild Co.*, 382 F.2d 637. Moreover the moving papers would be insufficient to justify the relief requested even if such a claim were alleged. Plaintiff has failed to set forth any facts to show that defendants are liable for maintenance and cure under United States Law. Plaintiffs' contention that defendants are collaterally estopped from contesting liability, which is based on the denial of a motion to dismiss for failure to state a of motion in another action brought by a different plaintiff against the same defendants, is without merit. The denial of a motion to dismiss for failure to state a cause of action is not determinative of ultimate liability. In any event, that portion of the order inter alia, denying the motion to dismiss relied on by plaintiff has been reversed by the Appellate Division First Department.

Dated: OCT 3 1977

s/ EJG
J.S.C.

PLAINTIFF'S NOTE OF ISSUE AND STATEMENT OF READINESS

Calendar No. 82141
Index No. 23829/76
Supreme Court, New York County, N.Y.

S.M. PIRES and VIRGINIA PIRES, his wife,
Plaintiffs

against

FROTA OCEANICA
BRASILEIRA, S.A.
FERNANDO FROTA
OMNIUM TRANSPORTATION CO.
(Liberian Corp.)
OMNIUM AGENCIES, INC.
JAMES BYRNE, GALVESTON WHARVES d/b/a PORT OF GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES d/b/a PORT OF GALVESTON and CITY OF GALVESTON d/b/a PORT OF GALVESTON,
Defendants

NOTICE FOR TRIAL

Trial by jury demanded
Of all issues
Filed by attorney for Plaintiff Pt. 16
Date summons served 10/14/80
Date service completed 10/14/80
Date issue joined 1/7/81

NATURE OF ACTION OR SPECIAL PROCEEDING
Contract—M & C and Associated Claims

Amount demanded $3,000,000.

Preference claimed under
On the ground that Case assigned to Justice Edward J. Greenfield for all purposes by Order of J. Dudley, dated 4/27/77

Insurance carrier(s), if known: 1. Action is part of complex ligation as per Order, 4/27/77 Dudley

Attorney for Plaintiff KENNETH HELLER, Esq., 335 Broadway, New York, New York 10013; Phone No.: (212) 962-6085. Attorneys for Defendants Cichanowicz, Callan & Keane, 80 Broad Street, New York, New York 10004 (From Frota Oceanica - Byrne) Phone No. (212) 344-7042.

Conboy, Hewitt et al, 100 Park Avenue, New York, NY 10017 (from Galveston Wharves to end) Phone 309-1000.

NOTE: Clerk will not accept this note of issue unless accompanied by a certificate of readiness. In a medical malpractice action, the statement of the amount to conform to the requirements of CPLR 3017(e).

FILED, MAY 6, 1986, COUNTY CLERK'S OFFICE, NEW YORK

Plaintiff's Note of Issue and Statement of Readiness

1. All pleadings served.....completed
2. Bill of Particulars served .....completed
3. Physical examinations completed .....completed
4. Medical reports exchanged .....completed
5. Appraisal reports exchanged .....not required
6. Financial disclosure statements in matrimonial cases exchanged.....not required
7. Discovery proceedings now known to be necessary completed .....completed
8. There are no outstanding requests for discovery.
9. There has been a reasonable opportunity to complete the foregoing proceedings.
10. The case is ready for trial.

Dated: April 22, 1986

s/ Kenneth Heller
Signature—type name below

Kenneth Heller, Esq.
Attorney for Plaintiff
Office & P.O. Address
335 Broadway
New York City, N.Y. 10013

State of New York, County of New York ss.:
Oi Ling Chiu being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at 335 Broadway, New York, N.Y. That on the 22nd day of April, 1986 deponent served the within note of issue and certificate of readiness on Conboy, Hewitt, et al. and Cichanowicz, Callan & Keane attorneys for Defendants—100 Park Ave., NYC, NY herein, at his office at 80 Broad Street, New York, New York 10004 during his absence from said office
(g) by then and there leaving a true copy of the same with

his clerk; partner; person having charge of said office. (h) and said office being closed by depositing a true copy of same, enclosed in a sealed wrapper directed to said attorney(s), in the office letter drop or bar.

Sworn to before me this 22nd
day of April, 1986
Oi Ling Chiu
SUSAN M. SMITH
Notary Public, State of New York
No. 31-3744590
Qualified in Kings County
Commission Expires March 31, 1988

SUPREME COURT - FIRST JUDICIAL DEPARTMENT
JUDICIAL ASSIGNMENTS
Civil Branch

After review of the special circumstances attendant upon the multi-party proceedings below mentioned, and in accordance with procedures to expeditiously resolve all pending and future pre-trial Court, Civil Branch, First Judicial District, pursuant to the authority conferred upon him, does herewith designate the said proceedings to be henceforth known as a "complex litigation case" and does order the following case assignments in New York County:

The pending proceedings entitled *Estate of Famuel Diaz de Souza v. Frota Oceanica Brasileira et al* (Index No. 21754/76, Special Term, Part 1); and, *Estate of Jose Porfirio Barbosa v. Frota Oceanica etc.* (Index No. 22137/76, Special Term, Part I); and, *Estate of Waguih Antoun A. Elbakh v. Frota Oceanica etc.* (Index No. 6672/77, Special Term, Part I); and, *Estate of Pires v. Frota Oceanica etc.* (Index No. 23829/76, Special Term, Part I); wherein all of the several proceedings have been heretofore unassigned, there being no "note of issue" and "statement of readiness" filed, and the said proceedings having remained in the Motion Calendar Part, it is now

ORDERED, that the aforementioned proceedings designated as a "complex litigation case" is herewith assigned for all purposes, together with all pending and future pre-trial applications, to Justice Edward J. Greenfield (Trial Term, Part 22).

It shall be noted by all counsel, that henceforth, upon filing any application with the Court the moving papers shall contain an endorsement in the caption indicating the proceeding has been assigned to Justice Greenfield before whom the motion must be made returnable.

Dated: April 27th, 1977
New York, New York

s/Edward R. Dudley
ASSISTANT ADMINISTRATIVE JUDGE

NOTE OF ISSUE MEMORANDUM
DECISION, J. GREENFIELD,
DATED 8/19/86

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 4

S.M. PIRES and VIRGINIA PIRES, his wife,
Plaintiffs,

-against-

FROTA OCEANICA, BRASILEIRA, S.A. FERNANDO FROTA, OMNIUM TRANSPORTATION CO., (Liberian Corp.), OMNIUM AGENCIES, INC., JAMES BYRNE, GALVESTON WHARVES d/b/a PORT OF GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES d/b/a PORT OF GALVESTON and CITY OF GALVESTON d/b/a PORT OF GALVESTON,
Defendants.

Greenfield, J.:

Defendant Frota's motion to strike the case from the calendar and to vacate the note of issue is denied. The issue to be tried is plaintiffs' entitlement to maintenance and cure. By decision of October 3, 1977, this court denied plaintiff's motion for partial summary judgment, but did not grant judgement to defendant on this issue. That left the case with issues of fact to be tried as to maintenance and cure. While the court noted in passing that plaintiff did not allege a cause of action for maintenance and cure, that is not tantamount to a ruling as law of the case. See *Credit Francais* v. *Sociedad Financiera De Comercio*, 138 Misc 2d 564, 575.

Paragraphs 19 and 20 of the amended complaint do, in fact, allege a basis for plaintiffs' claim of maintenance and cure. Whether defendant ship owner is liable for such maintenance and cure is among the issues to be resolved upon trial.

This matter is wholly separate and apart from the claims of liability asserted against the ship and defendant Galveston Wharves, which can be dealt with hereafter.

Dated: August 19, 1986

ORDER, APPELLATE DIVISION, FIRST DEPARTMENT, 5/14/87

New York on May 14, 1987

Present-Hon. Leonard H. Sandler
Sidney H. Asch
E. Leo Milonas
Bentley Kassal
Richard W. Wallach

S.M. Pires and Virginia Pires, his wife,
Plaintiffs-Respondents,
against
Frota Oceanica Brasileria, S.A., Fernando Frota, Omnium Transportation Co. (Liberian Corp.), Omnium Agencies, Inc., James Byrne, Galveston Wharves, d/b/a Port of Galveston, Board of Trustees of Galveston Wharves and City of Galveston, d/b/a Port of Galveston,
Defendant-Appellants.

Appeals having been taken to this Court by the defendants Frota Oceanica Brasileira, S. Fernando Frota, Omnium Transportation Co., Omnium Agencies, Inc., and James Byrne, defendants Galveston Wharves, d/b/a Port of Galveston, Board of Trustees of Galveston from an order of the Supreme Court, New York County (Edward Greenfield, J.), entered on October 10, 1986.

and said appeals having been argued by Victor S. Cichanowicz and Joseph F. DeMay, Jr. of counsel for appellants Frota Oceanica Brasileira, S.A., *et al.*, and by Thomas V. McMahon, of counsel for appellants Galveston Wharves, *et al.*, and by Kenneth Heller, of counsel for the respondents, and due deliberation having been had thereon

It is *unanimously* ordered *that* the order so appealed from be and the same is hereby affirmed, without costs and without disbursement

ENTER:

HAROLD J. REYNOLDS
Clerk

SUPREME COURT OF THE STATE OF NEW YORK TRIAL TERM PART 22

at the Courthouse thereof, 60 Centre Street, New York, New York, 10007.

Present: Hon. Edward J. Greenfield

Justice.

S.A. Pires and Virginia Pires

-against-

Frota Oceanica Brasileira, et al

The following papers numbered 1 to.....read on this motion.....

***

Upon the foregoing papers this motion is decided in accordance with accompanying memorandum decision.

Dated MAY 26 1987

s/ EJG
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 4

S.M. PIRES and VIRGINIA PIRES, his wife,

Plaintiffs,

-against-

FROTA OCEANICA BRASILEIRA, S.A.; FERNANDO FROTA, OMNIUM TRANSPORTATION CO. (Liberian Corp.); OMNIUM AGENCIES, INC., JAMES BYRNE, GALVESTON WHARVES d/b/a PORT OF GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES, d/b/a PORT OF GALVESTON and CITY OF GALVESTON,

Defendants.

GREENFIELD, J.

Frota Oceanica Brasileira, Fernando Frota, Omnium Transportation Co., Ominium Agencies, Inc., and James Byrne have moved to dismiss the amended complaint and have asked for summary judgment in favor of the defendants.

This action arises out of injuries sustained by the plaintiff on the waterfront in Galveston, Texas, a short distance from his ship. As a result of being run over in the railroad switching yard adjacent to the ship's dock at night, plaintiff suffered the traumatic amputation of his right leg.

The motion of the defendants is predicated on three grounds: (1) that any claim plaintiff may have can be brought only against his employer, Frota Oceanica Brasileira; (2) that inasmuch as the accident took place on shore, there was no breach of duty owing by the shipowner to the plaintiff; and (3) the owner had no duty of Maintenance and Cure under the circumstances.

I. OWNERSHIP AND CONTROL.

The plaintiff alleges that despite the Brazilian trappings of the vessel on which he was employed, and the fact that his contract of employment was with Frota Oceanica Brasileira, in truth, as in Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, the ship may have actually been controlled by an owner or owners in the U.S. The flag of the vessel, the nationalities of the seamen, and the parties to the employment contract are considered only "minor weights" in determining whether one is a Jones Act employer. Id, p.310. The most important factor in determining American ownership are ownership of the stock and the location of the base of operations for the managing and chartering of the vessel. Moncada v. Lemuria Shipping Corp., 491 F 2nd 470 (2d Cir), cert. den. 417 U.S. 947. The question of whether the vessel flew the Brazilian flag merely as a "flag of convenience" or is subject to the Jones Act must be determined by an examination of the underlying facts. See Pandazopoulos v. Universal Cruise Line, 365 F Supp. 208.

Prior to examination of these facts, and complete exploration in discovery proceedings, it would be premature to dismiss the action against individuals or entities who are alleged to have exercised real control. Accordingly, that branch of the motion seeking summary judgment because of lack of ownership is denied, as is the branch of the motion seeking to vacate notices of discovery as to the control exercised by defendants Fernando Frota, Omnium Transportation Co., Omnium Agencies, Inc. and James Byrne.

II. RESPONSIBILITY FOR ACCIDENTS ASHORE

The contention by the defendants that they owe no duty to a seaman employed by them beyond the end of the vessel's gangway (Dangovich v. Isthmian Lines Inc., 218 F. Supp. 235, 237, aff'd 327 F. 2d 355) is an over-simplification. The United States Supreme Court has held in Aguilar v. Standard Oil Co., 318 U.S. 724, that the liability of a ship owner may include accidents occurring between the moored ship and the public streets. It is alledged here that because the plaintiff had sustained burn injuries to his hands when carrying out his duties aboard ship, he was going ashore either to get appropriate medication for his hands, or for proper gloves to protect them,

and that therefore, in disembarking, he was still in the ship's service--that he was not going ashore merely on shore leave for his own pleasure. It is alleged that plaintiff's superiors told him the route to follow from the ship into the city, and may even have accompanied him, without warning him of the proximity of railroad activity. Plaintiff was a stranger to the port, he could not find his way about the unlighted harbor at night and spoke no English. Ugarte v. U.S. Lines Inc., 105 AD 2d 606 (1984) is not to the contrary. Unlike what is alleged here, the plaintiff there had gone on shore leave and had chosen on his own to climb between two railroad boxcars, the dangers of which were open and apparent. Under these circumstances, questions of fact are raised as to the scope of the responsibility of the defendants which preclude summary judgment.

III. MAINTENANCE AND CURE

The owners of a ship have an obligation, wholly separate and apart from liability for unseaworthiness or for shore-based accidents, to provide Maintenance and Cure to seamen injured in the service of the ship. Vaughn v. Atkinson 369 U.S. 527. This obligation is wholly separate and apart from any obligation arising under the Jones Act. The obligation to provide Maintenance and Cure appears to be an obligation of the general maritime law, irrespective of the flag of the vessel. For these reasons, because responsibility for Maintenance and Cure is a separate and distinct issue from questions of negligence and Jones Act responsibility, this court has directed that the Maintenance and Cure aspects of this case be tried prior to the resolution of the other questions raised. This determination has been approved by the Appellate Division, and the court will deal with that issue separately.

On this motion, defendants' application for summary judgment or to vacate or modify the disclosure notices is denied.

Dated: May 26, 1987

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 4

S.M.PIRES and VIRGINIA PIRES, his wife,

Plaintiffs,

-against-

FROTA OCEANICA BRASILEIRA, S.A., FERNANDO FROTA, OMNIUM TRANSPORTATION CO. (Liberian Corp.), OMNIUM AGENCIES INC., JAMES BYRNE, GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES and CITY OF GALVESTON d/b/a PORT OF GALVESTON

Defendants.

PLEASE TAKE NOTICE that the above named defendant Frota Oceanica Brasileira, S.A. ("FROTA") hereby appeals to the Appellate Division - First Department from each and every part of an order rendered against it by the Supreme Court, New York County, Trial Term, Part IV, Justice Edward Greenfield on February 5, 1991, and entered in the office of the County Clerk on February 6, 1991, ruling that the money judgment in plaintiff's favor herein dated October 21, 1988 which plaintiff seeks to enforce in the amount of about $1,107,360.97 (the "Judgment") is presently enforceable against FROTA, despite a prior ruling by the Court of Appeals that the Judgment is not a final judgment, and despite FROTA's service of a conditional notice of intention to appeal to the United States Supreme Court from the Judgment and each and every part thereof, and the decision of the Appellate Division dated May 1, 1990 modifying and affirming the Judgment and the decisions of the Court of Appeals dated November 27, 1990 and January 15, 1991, denying FROTA leave to appeal on grounds of lack of

finality in the order appealed form, and from each and every part thereof, in the event it was ruled by a court of competent jurisdiction that the Judgment was presently enforceable despite the Court of Appeals' ruling that it is not a final Judgment.

Dated: New York, New York
February 6, 1991

NOURSE & BOWLES
Attorneys for Defendant
FROTA OCEANICA BRASILEIRA, S.A.

By———————————————
Shaun F. Carroll (SC9898)
One Exchange Plaza
At 55 Broadway - 30th Fl.
New York, N.Y. 10006
(212) 952-6200

By Hand

TO: Kenneth Heller, Esq.
335 Broadway - 6th Fl.
New York, NY 10013

Mr. Thomas McMahon
1, Demers & McManus
55 John Street - 16th Fl.
New York, NY 10038

-AND-

Via Telecopier - 516-294-5387

Ahmuty, Demers & McManus
2000 I.U. Willets Road
Albertson, New York 11507

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on March 7, 1991

Present - Hon. Theodore R. Kupferman, Justice Presiding
Sidney H. Asch
Richard W. Wallach
George Bundy Smith
Isreal Rubin, Justices

S.M. Pires and Virginia Pires, his wife,

Plaintiff-Respondents,

-against-

Frota Oceanica Brasileira S.A.,

Defendant-Appellant,

Eduardo Lopez as Executor for the Estate of Fernando Frota, Omnium Transportation Co. (Liberian Corp.), Omnium Agencies Inc., J. Dixon Byrne as Executor for the Estate of James Byrne; Galveston Wharves d/b/a Port of Galveston, Board of Trustees of Galveston Wharves and City of Galveston d/b/a Port of Galveston,

Defendants.

The above-named defendant-appellant Frota Oceanica Brasileira S.A., in connection with its appeal from an order of the Supreme Court, New York County, entered on February 6, 1991, having moved this Court for a stay of payment of the balance of the money judgment in plaintiffs' favor.

Now, upon reading and filing the papers with respect to said motion, and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied.

ENTER:
Francis X. Galdi
Clerk

37405319

CERTIFIED

FOR $450,000.00

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NOURSE & BOWLES
ESCROW ACCOUNT
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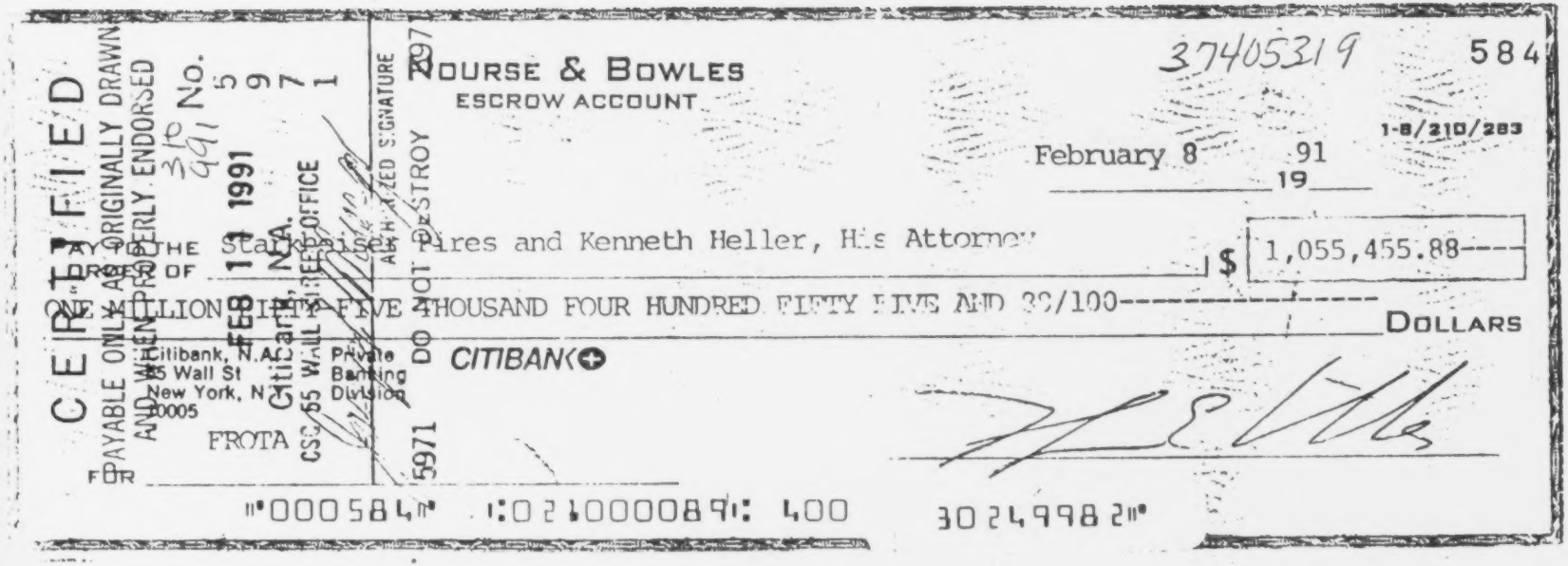
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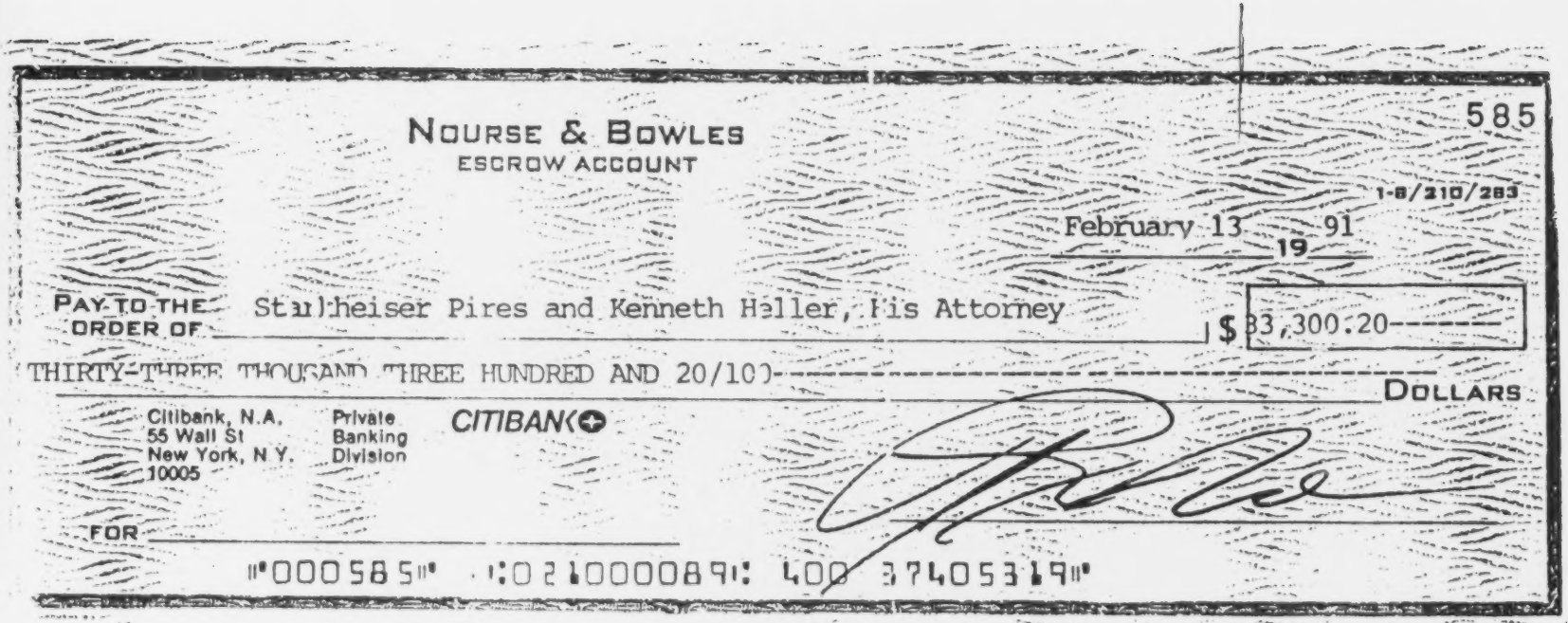

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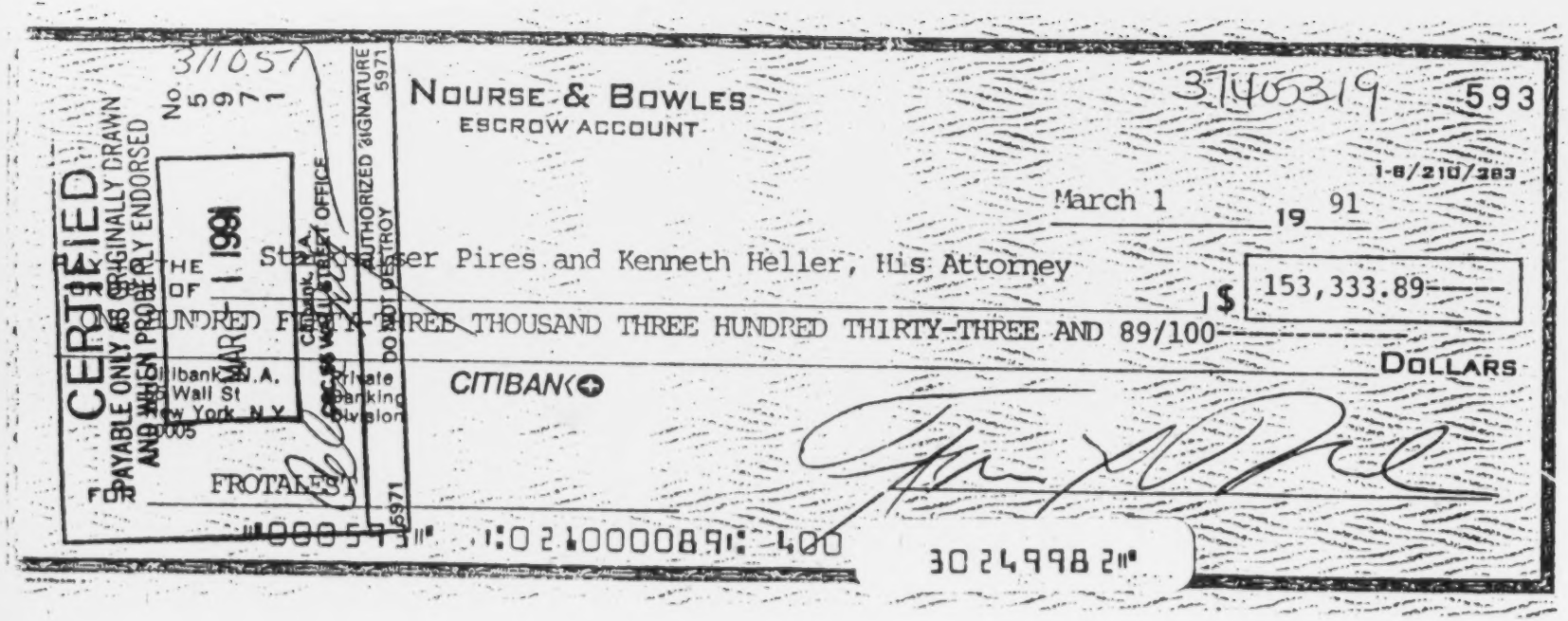
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OFFICE OF THE CLERK

No. 90-1582

(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FROTA OCEANICA BRASILEIRA, S.A.,

Petitioner,

vs.

STARKHEISER DaSILVA MATOS PIRES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

REPLY BRIEF OF PETITIONER

NOURSE & BOWLES
Attorneys for Petitioner
One Exchange Plaza
at 55 Broadway
New York, New York 10006
(212) 952-6200

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No. 90-1582

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FROTA OCEANICA BRASILEIRA, S.A.,

Petitioner,

vs.

STARKHEISER DaSILVA MATOS PIRES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

REPLY BRIEF OF PETITIONER

STATEMENT OF THE CASE

In this admiralty and maritime case, Petitioner, Frota Oceanica Brasileira, S.A. seeks plenary review of a decision of the New York State Supreme Court, Appellate Division, First Department, affirming a judgment of the New York State Supreme Court that (1) awarded respondent S.M. Pires over

$1,323,666.70 in maintenance and cure, most of which is a lump-sum award of forty years worth of "future" cure and (2) held Frota liable for consequential damages, attorneys' fees and punitive damages, which alone are presently quantified at $24,000,000.00, for "willful" termination of maintenance and cure.

Pires' opposing brief contends that certiorari is inappropriate because seamen are entitled to maintenance and cure until "maximum cure" is achieved and because recent decisions of this Court are said to authorize awards of punitive damages in a generic sense. Pires also contends that Frota waived the right to appeal the issue of punitive damages, and that Brazilian law governs this case.

The opposing brief sets forth no authority calling into question the existence and substantiality of the issues presented for review by Frota's petition. The fact remains that the granting of lump sum future cure for the lifetime of a seaman is unprecedented. Such an award is in conflict with long-standing decisions of this Court. Further, there has been conflict among the Circuits as to the availability of punitive damages for failure to provide maintenance and cure, and it appears that *Miles v. Apex Marine Corp.*, __ U.S. __, 111 S.Ct. 317 (1990) may resolve that conflict. The significant questions presented by Frota's petition were preserved, they are timely presented, and they are deserving of consideration by this Court.

REASONS FOR GRANTING THE WRIT

I. There is No Precedent for Lump Sum Awards of Maintenance and Cure for Life

The case law cited by the Respondent deals with the issue of "maximum cure," not the availability of a lump sum award of future cure for life. Moreover, Respondent's cases support the view that maintenance and cure should be limited to

specific treatment needed in the immediate future. For example, *Brown v. Dravo Corp.*, 157 F. Supp. 265 (W.D. Pa. 1957) *aff'd*, 258 F.2d 704 (3d Cir. 1955) *cert. denied*, 359 U.S. 960 (1959), cited by Respondents as an example of future cure "for an indefinite period," actually ordered payment of nine years of past cure and payment for specific surgery needed at the time of the trial. The court directed that "immediate steps be taken in this direction." 157 F. Supp at 268.

Similarly, *Scott v. Lykes Bros. Steamship Co., Inc.*, 152 F. Supp. 104 (E.D. La 1957), while taking an expansive view of "maximum cure," only awarded maintenance and cure due up to the time of trial. There was no cash award for future cure.

Sobosle v. United States Steel Corp., 359 F.2d 7 (1966), recognized a seaman's right to return for further maintenance and cure when and as needed, in that case twenty years after the injury. There was no cash award for future cure.

Thus, the authorities cited by the Respondent do not support lump sum awards of future cure for life, and do not diminish the importance and validity of the future cure issues presented by Frota's petition. The authorities are consistent with Frota's position.

II. The Punitive Damage Liability Finding Should Be Reviewed

The issue as to whether punitive damages are recoverable under the general federal maritime law for failure to provide maintenance and cure was not resolved by *Pacific Mutual Life Insurance Co. v. Haslip*, __ U.S.__, 111 S.Ct. 1032 (1991). *Haslip* dealt only with state law. Federal maritime law is a matter uniquely within this Court's jurisdiction and this Court is not bound by any state law or procedure. The availability of punitive damages under the law

of the several states is irrelevant. The conflict among the circuits as to the availability of punitive damages in a maintenance and cure case is clear. *Miles v. Apex Marine, supra,* appears to resolve the conflict. The Court should grant certiorari to consider the issue fully, or summarily reverse the judgment and remand for consideration in light of *Miles*.

Frota timely preserved all objections to the instructions and standards applied by the trial court in connection with the finding that Frota had "willfully" terminated maintenance and cure. (R. at 1675-1676). Thus, even if punitive damages are recoverable for "willful" failure to provide maintenance and cure, Frota's liability for punitive damages in this case is properly presented for review.

III. The Decision Below is Sufficiently Final to Permit Review

That portion of the judgment below awarding maintenance and cure which Frota has paid is sufficiently final for review at this time. Payment of a money judgment is the analytical equivalent of the transfer of physical property, and it has long been recognized that a judgment requiring transfer of property is sufficiently final for review. *Forgay v. Conrad,* 6 How. 201 (1848).

As to that portion of the judgment finding Frota liable for punitive damages in some form, Frota has exhausted all appeals as of right in the New York State Court system. The issue of Frota's "willfulness" in terminating maintenance and cure has been decided by the highest New York State court willing to consider the issue. This issue will survive and require decision regardless of the outcome of any pending state court proceedings or automatic appeals therefrom. It appears that the issue is properly presented for review at this time.

IV. If Brazilian Law is Applicable, It is Subject to Review By This Court

Respondent's brief suggests that the judgment below is immune from review by this Court because it is grounded in a jury finding on the substance of Brazilian law. (Brief in Opposition at 8). This statement is factually incorrect. The jury never considered any issues as to the substance of Brazilian law, nor should they have done so. The court below ruled on the substance of Brazilian law. Further, a review of the lower court's post trial opinion reveals that, aside from a general observation that Brazilian law recognizes maintenance and cure, the decision below is based entirely on United States law. An interpretation of domestic or foreign law is a question of law subject to review by this court *de novo*. Rule 44.1 Fed. R. Civ. P.; *Weston Banking v. Turkiye Garanti Bankasi*, 86 A.D.2d 544, 446 N.Y.S.2d 67 (1st Dept. 1982) *aff'd*, 57 N.Y.2d 315, 442 N.E.2d 1195, 456 N.Y.S.2d 684 (1982).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review that portion of the order of the New York Supreme Court Appellate Division, First Department which affirmed the judgment of the New York Supreme Court.

Respectfully submitted,

THOMAS E. STILES
SHAUN F. CARROLL

NOURSE & BOWLES
Counsel for Petitioner
One Exchange Plaza
at 55 Broadway
New York, New York 10006
(212) 952-6200

May 21, 1991